

LIBERALISM AND BORDERS: FINDING MORAL
CONSENSUS IN THE OPEN BORDERS DEBATE

by

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ABSTRACT

In recent decades liberal political philosophy has debated a significant question: If the basic commitment of liberal political theory is the equal moral standing of all individuals, how do we justify the presence of borders and their control such that individuals receive different consideration and treatment based solely upon their status as members of a particular political community? One position claims that hard borders are unjustifiable; borders must be open as a matter of right and respect for all individuals. At the other end of the spectrum is the position that hard borders are justifiable; borders can be closed as a matter of the right of particular communities to the goods that community creates and the preservation of that community's unique identity. A third category of arguments considers the problem from the perspective of the nonideal circumstances in the world; opening borders is an appropriate and necessary response to resolving problems of hunger, poverty and violence in the world. I examine several arguments in each of these categories, finding that the arguments offered are problematic in ways which make them less than fully persuasive, even though they explore in valuable ways different aspects of the debate. A second problem is that this moral debate has failed to influence in any meaningful way the ongoing public policy debate related to immigration. To overcome this second problem I utilize a model proposed by Jonathan Wolf and Avner de-Shalit in which philosophically fragmented concepts, which cannot influence policy in their fragmented state, are brought to bear upon policy through the identification of the moral consensus present in the debate. This moral consensus, which represents the

central moral concern of the debate, can be effectively applied to the appropriate policy debate. The proposed consensus is based upon the central moral concern of the open borders debate, the effect of immigration control policies upon the well-being of individuals, and argues that states may control their borders constrained by the obligation to give consideration to the effects of control policies and to ameliorate the negative effects of such policies.

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CHAPTER 1

INTRODUCTION

Since the first human left the Olduvai Gorge, humans have been on the move. Whether pushed from a place by hunger, disease, war or natural disaster, or pulled to a place by better weather, better resources, or better opportunities, people have migrated from old places to new places, sometimes in hope of a better life and other times without any choice. For most of history, when people have moved they did so without regard for the invisible lines we call borders. Since the initiation of the Peace of Westphalia in the mid-seventeenth century, international law has recognized the state rights of political sovereignty and territorial integrity. Countries had the right to control their borders, but none did except in the case of war. State control of borders, especially as regards controlling the movement of people across them, is a recent phenomenon. Passports were created during the First World War and formal state policies are only a few decades older. Migrating peoples have often clashed with the established population, but the clash with state authority is a recent problem.

Immigration policies developed to control borders and those who would move across them often lead to difficult decisions with ugly results. People die in ship holds and in deserts trying to reach the Promised Land. When they make it, they are often not allowed to stay. France deports thousands of Roma, Israel hundreds of Arabs and the United States thousands of Mexicans, splitting families, sending children to countries

they have never seen and denying to many any hope of prosperity. Policies that result in such a grave impact upon human lives are rightfully questioned and morally suspect.

Liberal political philosophy, which as an approach to political philosophy is younger than the rights accorded to states in the Westphalian model, has engaged in a robust discussion over the last thirty years about the right of states to control borders if the foundation of our thought and political systems is that of liberal political philosophy. Although there is no single agreed to conception of liberal political philosophy, those views that fall within this school of thought may be, according to John Gray, broadly characterized as individualist, egalitarian, universalist and meliorist.¹ It is the individual that is primary in our consideration of social systems and within these systems each individual is to be treated with equal moral standing. But this attitude of equality is not limited to those with whom we are already associated, but extends to all humanity, even to those outside our existing social systems. Finally, these social systems, because they are human social systems, are fallible and always open to improvement. Lomansky puts the problem this way:

Liberals posit the existence of human rights that proclaim the essential moral status of persons qua persons. Correlative to these rights are duties of forbearance falling upon those who transact with rights-holders. These rights and associated duties are *universal*; they are possessed by everyone and owed everyone...the rule among liberal theorists is to take states in whatever form and variety they come down to us as the relevant objects for molding in accord with precepts of justice.²

From this conception of liberalism the question arises that if all people have fundamental equal moral value and should be considered equal by the political systems of the world, then on what grounds do we justify treating people differently because of their state

¹ Gray, John. *Liberalism*, second ed. (Minneapolis: University of Minnesota Press, 1995), 6.

² Loren Lomansky, "Toward a Liberal Theory of National Boundaries," in *Boundaries and Justice*, edited by David Miller and Sohail H. Hashmi (Princeton: Princeton University Press, 2001), 55-56.

affiliation. Specifically for the problem of borders, on what grounds do states prevent, by means which may include the use of physical force, people from entering and taking up residence in a country? Is it morally permissible for the state to take up arms, build fences, and engage in other actions that prevent some person, or group of persons from entering the country?

The answer to these types of questions generally falls into two schools of thought. Associated with the membership arguments of Michael Walzer, those who argue for closed borders claim that communities of people that share political arrangements have the right to shape those communities according to their own desires. This includes deciding who does and who does not benefit from the arrangements the people of that community choose to have. Although this view is often thought to be in support of the standard Westphalian approach to the problem of borders, it is more sophisticated and subtle than the Westphalian model. The second school of thought, which has become the predominant school in liberal political philosophy, is associated with the work of Joseph Carens. Carens has developed, over the years, a set of arguments in support of the claim that states do not, except under very limited and unusual sets of circumstances, have the right to close borders and prevent people from moving from one place to another. Both the open and the closed borders proponents also argue from single principles of significance to liberals, such as the freedom of movement or the freedom of association and claim that when properly understood, a commitment to this principle leads to the conclusion that borders should be open or closed.

These first two classes of arguments aim at theoretical consistency. In addition to these two divergent views, there is a set of arguments focused upon nonideal

circumstances which reach more limited conclusions. These arguments find open migration, under particular conditions or for particular reasons, an important solution to these problems. Frederick Whelan has considered the argument that migration is more effective than aid, and more recently Shelley Wilcox has argued that migration is the best way to resolve particular dilemmas related to the vast discrepancy in well-being in the world and to deal with extreme circumstances. Taking a more limited economic focus, the arguments of Bimal Ghosh and Thomas Straubhaar propose international regimes that support the open movement of people as producing the best economic results.

The standard approach to this “open borders debate” is to develop arguments which support the conclusion that countries whose core political commitments are those of liberal political philosophy either are, or are not, permitted to close their borders to those who live outside them. Unfortunately this approach has not, over the approximately thirty years that the debate has gone on, enabled the resolution of this theoretical controversy. During this same period the political world around us has struggled, and continues to struggle, with the very real effects of both legal and illegal migration. The goal of this thesis is to evaluate the standard arguments regarding borders and identify problems in the arguments that prevent them from being completely persuasive. I will then argue that one possible way around the stalemate is to identify the moral consensus within the debate. This moral consensus will help to focus the debate upon the most important and central concerns of the debate in a manner that will support the subsequent development of moral principles reflective of this consensus and applicable to contemporary immigration control policy. I will propose and explore a consensus for the open borders debate that claims the central concern of the debate is the

negative effects of border controls upon individual lives of both those inside and outside the state.

Methodological Approach

Standard philosophical practice is to engage in the construction of arguments and the analysis of concepts used within those arguments in order to create deductively and inductively sound arguments. This will be my approach as well for the first three chapters to follow. I will analyze the arguments offered and claim that problems exist in them that either makes them invalid or unsound. However, following this analysis I will make a positive argument that there is a shared concern in these failed arguments, a kind of moral consensus that reflects the heart of the debate. The idea that a moral consensus can often be identified within contentious normative debates is part of the three-step process Jonathan Wolff and Avner de-Shalit use in their book *Disadvantage*. Wolff and de-Shalit's claim is that fields of political theorizing that are fractured by a large number of competing views often possess a theoretical consensus that is translatable into policy terms. This consensus can be used to influence policy. Identifying the consensus is the first step of their process and is the focus of this thesis. I will identify and develop a consensus for the open borders debate.

Chapter Summaries

The present chapter, Chapter 1, "Introduction," introduces the problem of borders for liberal political philosophy, provides a brief overview of methodology, and presents an overview by chapter of the content of this thesis.

Chapter 2, “Liberalism and Open Borders,” considers the argument that the central commitments of liberalism lead to a claim that states do not, under almost all circumstances, have the right to close their borders to those who are outside them. The positive statement of these arguments is that generally, people should have the right to move across national borders unconstrained. I will consider two arguments of Joseph Carens. The first is his common conclusion argument in which he claims that several divergent liberal political philosophies all lead to the conclusion that borders should be open. I will offer my own critique of Carens’ position which concludes that the liberal arguments considered by Carens do not support the claim of open borders and, in fact, can support the claim for border controls. I will also consider and reject Peter Mailaender’s critique of Carens, which claims that Carens’ argument is incomplete because of its reliance upon liberalism without providing a justification for that reliance. I will also consider Carens’ second argument, based on the claim that liberalism leads to a robust commitment to the freedom of movement which is violated by the control of borders. I will reject this argument, including a variation from the libertarian perspective of Chandran Kukathas, by specifying a principle of freedom of movement and demonstrating that freedom of movement can be constrained in ways that are not objectionable to liberals. The final portion of this chapter considers two left-libertarian arguments of Hillel Steiner. The first is based upon the claim that freedom of association prevents states from controlling borders because it violates the right of individuals to associate with those outside the border. The second argument is based upon the idea of world-ownership. If each of us is part owner of the natural resources in the world, and

borders prevent us from accessing those resources we own, then borders violate individual rights and cannot be justified. I will reject both of these arguments.

Chapter 3, “Liberalism and Closed Borders,” considers the closed borders arguments of Michael Walzer, David Miller and Christopher Wellman. These arguments, communitarian in flavor, fall within political liberalism. Walzer reflects upon the nature of communities and the goods they produce, which includes determining who should share in those goods. In his famous membership argument, Walzer uses neighborhoods, clubs, and families to understand why states are justified in controlling borders. I will consider and reject Phillip Cole’s critique of Walzer’s membership argument, but propose my own critique of Walzer in which I argue that membership, as conceived by Walzer, violates his own theory of justice because membership is a dominant good. Miller’s arguments focus upon the role that national identity plays in communities, the right of communities to self-determination and the claim that nations are ethical communities. This right to self-determination justifies the right of communities to control the changes that occur within those communities. I will consider and reject Cole’s critique of Miller, which is based upon the conflict between ethical particularism and ethical universalism. Cole claims the two views are exclusive. I will argue that not only are they not exclusive, but that ethical universalism also can’t solve the problems that Cole believes arise from ethical particularism. I will close by examining the recent work of Christopher Wellman, whose freedom of association argument is receiving significant attention. Wellman’s argument is troubling for two reasons. The first is that he seems to conflate the ideas of self-determination and freedom of association, sometimes assuming that freedom of association is constitutive of self-determination. The second problem is that Wellman

fails to properly consider the problem of political disassociation for people at the state level.

Chapter 4, “Nonideal and International Regime Arguments,” considers two nonideal arguments in which the claim is made that immigration is a preferred means, and in some cases the only means, of resolving the horrendous circumstances and inequities in the world. I begin with Frederick Whelan’s consideration of the claim that immigration is superior to the provision of foreign aid. Whelan will reject this argument. This is largely an empirical argument and I will consider some of the issues related to determining the benefit of aid as opposed to migration. In the second nonideal argument I will consider Shelley Wilcox’s Global Principle of Harm. This principle argues that states that cause harm are responsible for ending their harmful practices and ameliorating the harmful conditions. Permitting immigration is one method of helping those who have been harmed. I will critique this argument, building on Thomas Pogge’s rejection of migration as a solution to poverty, and point out the difficulties in the conditions that Wilcox specifies to identify when states have violated her Global Principle of Harm. Bimal Ghosh and Thomas Straubhaar, as part of the New International Regime for the Orderly Movements of People project, propose international regimes to which countries can voluntarily commit themselves. These regimes, with a strong economic flavor, are patterned after existing agreements related to trade in goods and services, to which countries would commit themselves to follow. I will critique Ghosh and Straubhaar as being inadequate due to their focus upon economic concerns and the neglect of moral concerns, leading to significant questions about who benefits and what the benefits would be under the proposed international regimes.

Chapter 5, “Moral Consensus in the Open Borders Debate,” will explore the methodological approach of developing moral consensus for fragmented theoretical concepts as a means of enabling these concepts to influence public policy. This chapter will propose that the central concern of the open borders debate is the negative effects of immigration control policies upon individuals, both inside and outside the controlled borders. I will propose and explore a statement of moral consensus that reflects this concern.

Chapter 6, “Conclusion,” will summarize the thesis and point towards the next step in applying the moral consensus to national immigration control policies.

CHAPTER 2

LIBERALISM AND OPEN BORDERS

The claim that state borders should be open to the unconstrained movement of people is deeply rooted in various commitments of liberal political philosophy. There are two main variants of this argument. The first and oldest variant is rooted in claims that open borders are a moral ideal because many prominent and divergent political theories, when pushed to examine the problem of borders, result in a conclusion that borders should be open. When many different theories point to the same conclusion, that conclusion gains strength. I call this the common conclusion argument. The second variant, and perhaps the most common one expressed today, appeals to some principle of liberalism and then develops an argument for open borders based upon that principle. I call this category single principle arguments. This approach comes in several forms. The first form is rooted in egalitarian claims. Individuals are moral equals with rights to a freedom of movement that requires a robust expression in order for their standing as moral equals to be meaningful. People choose a kind of life to live and constraining movement in pursuit of that kind of life denies their moral equality. Life and opportunity require the possibility of movement. Hence, constraints upon that movement are unjustified and immoral. A variant of this form is rooted in the liberal commitment to liberty. People have rights to liberty that the state should not constrain. Principal among these rights is the freedom of movement. Constraining movement in most cases is,

therefore, unjustified and immoral. The distinction between these first two variants is that the second emphasizes freedom of movement as a right in itself whereas the first emphasizes moral equality with freedom of movement as instrumental in achieving other purposes. The third form is an appeal to the right of freedom of association. Rights to association are denied when borders prevent the voluntary association of free individuals. The fourth form of the argument for open borders has not gained much traction in the open borders debate. This approach relies upon a left-libertarian view regarding shared ownership of the world with a corresponding entitlement to resources. The denial of movement to resources to which one has ownership rights without compensation is a violation of an individual's rights. Therefore, there must be open borders or compensation.

In this chapter I will discuss each of these arguments, laying out the specific structures of each argument as exemplified in its most well-known proponent. I will argue that each of these arguments is problematic and therefore do not justify the claim that borders should be open. In some cases I will claim that the argument can be used to justify the opposite claim, that borders should be closed, or at least controlled. I will begin with the common conclusion argument since it is the oldest of the arguments, turning afterward to the single principle arguments.

The Common Conclusion Argument

The liberal argument for open borders is widely regarded as having its initial, and most influential statement, in the 1987 article of Joseph Carens, "Aliens and Borders: The Case for Open Borders." In this article Carens argues that when we examine the issue of open borders from the perspective of three divergent political theories, we find that each

of the theories supports the claim that borders should be open. These three theories, the minimalist state and entitlement arguments of Robert Nozick, the “justice as fairness” arguments of John Rawls and standard utilitarian approaches to political theory, all reach the conclusion that borders should be open, albeit for different reasons. When such divergent theories all reach the same conclusion, we are justified in claiming that the conclusion has great warrant and the burden of proof shifts to those claiming otherwise. Carens writes, “The fact that all three theories converge upon the same basic result with regard to immigration despite their significant differences in other areas strengthens the case for open borders.”¹

It is possible to understand the structure of Carens’ argument in standard inductive format. Each of the three theories forms a premise leading to the conclusion that border should be open. In propositional format the argument is this:

1. Theories divergent in their basic claims should lead to different conclusions on significant issues.
2. When divergent theories support the same claim, that claim is stronger than if only one theory supported that claim.
3. Nozick’s theory of the minimalist state and entitlement theory supports the claim that borders should be open.
4. Rawls’ theory of justice as fairness supports the claim that borders should be open.
5. Utilitarian political theory, in which the greatest good for the greatest number is pursued, supports the claims that borders should be open.

¹ Joseph H. Carens, “Aliens and Citizens: The Case for Open Borders,” *The Review of Politics*, 49 (1987): 252.

6. Each of these theories is divergent in its basic claims, expecting one to lead to different conclusions. (1, 2)
7. However, each of these theories leads to the same claim regarding open borders. (3, 4, 5)
8. Each of these theories is a form of liberal political theory.
9. Therefore, liberal political theory strongly supports the claim of open borders. (6, 7, 8)

As an inductive argument Carens' claim is vulnerable in a number of ways. One may weaken the conclusion by showing cases of liberal political theory that don't support the claim of open borders. I shall take this approach in the next chapter when I discuss the closed borders claims of liberal thought with a communitarian emphasis. Another way to undermine this argument is to demonstrate that one or more of the premises, which are themselves arguments, is incorrect. The balance of this section shall take this tactic in regard to premises 3, 4 and 5, thereby, undermining the conclusion. The argument, as it stands and as it is widely used, will no longer be sound. An additional tactic for undermining this argument, which will not be explored here, is to claim that the political theories of Nozick, Rawls and utilitarianism, all forms of liberalism that assume the equal moral worth of individuals, are not sufficiently divergent in their basic claims to meet the claim of the first premise. If that is the case, it is not surprising that they all reach a shared conclusion regarding open borders.

Nozick, Property and Borders

Carens claims there is a popular property rights argument in support of closed borders. It is embodied in the colloquial claim, "[t]his is our country. We can let in or

keep out whomever we want.”² Carens interprets this statement to mean “the right to exclude aliens is based on property rights, perhaps collective and or national property rights.”³ This general argument is as follows:

1. People have rights to private property, which includes the acquisition, use and disposition of property.
2. The territory within state boundaries is owned by the citizens of the state.
3. Government, as representative of the citizens of the state, has the right to control all of the property within the state.
4. Therefore, the closing of state borders by the state is permissible as an exercise of the property rights citizens hold regarding private property. (1, 2, 3)

Carens claims that the argument of Robert Nozick in *Anarchy, State and Utopia* is representative of this class of property rights arguments. I will argue against this claim on two fronts. The first is that understanding Nozick as an example of this property rights argument is not the only way, or the best way, to understand Nozick. I will argue that there are other ways to interpret Nozick which permit the control and possible closing of borders. If my argument holds, then Carens must justify the claim that his approach to Nozick is the correct approach, which he does not do. The second approach will argue against Carens’ interpretation of the initial colloquial claim.

Nozick is well known for the libertarian arguments he makes in *Anarchy, State and Utopia*. Carens’ interpretation of Nozick begins with the recognition that people have property rights, extending from the concept of self-ownership, in the state of nature. Self-ownership is the idea that each person has a moral right to their body and to the use

² Ibid.

³ Ibid.

of that body. G.A. Cohen writes, “each person is the morally rightful owner of himself...if I am the moral owner of myself, and therefore of this right arm...no one is entitled, without my consent, to press it into their own or anybody’s else’s service, even when my failure to lend it voluntarily to others would be morally wrong.”⁴ But it isn’t just the self that is owned. The ownership of self enables one to become the owner of property through the use of one’s labor. Cohen again: “persons can become, with equally strong moral right, sovereign owners of unequal shares of natural resources, as a result of proper exercises of their own...personal powers.”⁵ These natural rights to the ownership of self and of property are held equally by each person. Various inconveniences of the state of nature lead to the establishment of the minimalist state, whose sole role is to protect people from the violation of their rights. This means that the state cannot enforce rights that are not held by individuals in the state of nature. The state as an institution holds no special significance; it is merely instrumental in achieving the end of protecting rights that people cannot protect for themselves. The minimalist state protects both citizen and noncitizen within its territory. Therefore, citizenship gives rise to no distinct claims – both citizen and noncitizen are treated alike. Based upon entitlement theory, individuals may enter into voluntary exchanges regarding their property with whomever they choose. The state has no basis for interfering with these exchanges, so long as they are voluntary, because the right to participate in these exchanges is held by the individual *qua* individual, not by the individual *qua* citizen.⁶

⁴ G.A. Cohen, “Self-Ownership, World-Ownership, and Equality,” in *Justice and Equality Here and Now*, edited by Frank S. Lucash (Ithaca, NY: Cornell University Press, 1986), 109.

⁵ *Ibid.*, 110.

⁶ Carens, “Aliens and Citizens,” 253.

The implications of Carens' interpretation of Nozick for migration related issues are significant. The state has no grounds for preventing voluntary exchanges.⁷ If this exchange involves someone entering the state, for example, in the case of an American farmer who wishes to hire a Mexican laborer for harvest, the state cannot prevent this. To do so is to prevent the farmer from entering into a voluntary exchange. The disadvantage to American workers that results from this exchange is not a state concern and American workers should not be protected by the state from being disadvantaged by private, voluntary exchanges. Since all individuals are treated alike, foreigners may enter the country provided they are nonviolent and rights respecting. If the state prevents entry it violates the individual rights of both parties. The exclusion of a person from some piece of property can only be performed by the owner of that property; for another, be it individual or state, to exclude is to violate individual property rights. Carens' conclusion is that closed borders are, therefore, a violation of individual property rights on Nozick's account.

Carens allows that Nozick provides a caveat to this scenario. Individuals may undertake collective action to restrict entry. But this right is limited to small communities, nothing on the scale of either the minimalist state or the modern nation state. These communities can restrict entry but only if they permit exit so that individuals may exercise their individual rights elsewhere if they so choose. This caveat of Nozick's is of little significance here as it applies only in the context of utopian societies, a circumstance in which the current debate does not take place.

⁷ Under the Nozickian approach it is unclear how movement unrelated to exchanges, such as passing through to perform an exchange elsewhere or just passing through without any intent other than to pass through. This problem is deferred until Carens' later work on movement is considered below.

Carens argues that this view of Nozick is problematic for the claim that states may close borders. Entitlement theory recognizes that individuals have the right to determine the disposition of justly held holdings. Each individual chooses whether, and to whom, a holding should be transferred. The state has no role to play unless this process is violated in some way. Suppose that I hold some object that I wish to sell. If the state interferes with this process by closing borders so that I cannot deal with particular individuals, in this case foreign individuals, the state has interfered with my right to dispose of my property as I see fit. The state has violated my rights. Similarly, if the state refuses to permit entry, it has violated the rights of the entering individual. Only by permitting a completely open border can the state fully honor my property rights as well as the property rights of those outside the border. Carens' claim is that Nozick contains a property rights argument for completely open borders. He concludes, "Prohibiting people from entering a territory because they did not happen to be born there or otherwise gain the credentials of citizenship is no part of any state's mandate. The state has no right to restrict immigration."⁸ This is a strong and definitive conclusion to draw from Nozick's arguments. But is it justified?

Nozick's libertarian arguments in *Anarchy, State and Utopia* accomplish two purposes, of which Carens considers only one. Nozick offers both a theory of the state and a theory of goods. From the opening line of the "Preface" in which Nozick claims, "Individuals have rights, and there are things no person or group may do to them (without violating their rights),"⁹ to the statement of Entitlement Theory in Chapter 4, rights held by people in the state of nature, which include the right to hold property as an extension

⁸ Ibid., 254.

⁹ Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), ix.

of self-ownership, hold a central position in Nozick's argument. Entitlement theory is built around three principles which are intended to demonstrate how individuals come to hold things justly and how these individual holdings, when just, also lead to a claim about the justice of holdings across society. History, that is the actual process by which individuals come to hold particular things, determines whether any particular holding is just. The sole role of the minimalist state regarding the distribution of material goods is the protection of property rights by enforcement of the rules of entitlement theory. However, this role is not to ensure that holdings are distributed in some particular way in accordance with some principle of distribution (what Nozick calls a patterned distribution), but rather to ensure that the process is correctly followed. When the process is violated then the state uses its power to restore the proper distribution, which is the state of holdings prior to the violation. For example, if I steal someone's crops, the state may require me to either return the crops or pay for the crops, because I came to hold them in violation of the process. Carens' claim of Nozick as an example of a property rights theorist might be justified if this was the central component of Nozick's argument. There are other ways to cast the central concerns of Nozick.

Nozick is a natural rights theorist with a robust perspective on who possesses those rights and how they might be infringed upon. However, Nozick's central concern is the nature of the state: What kind of state can be justified before it violates the rights of individuals? Nozick's most basic question is, "If the state did not exist would it be necessary to invent it? Would it be *needed* and would it have to be *invented*?"¹⁰ His answers to these questions are that it is needed and it would be invented. But it would be only a limited state: "Our main conclusions about the state are that a minimal state,

¹⁰ Ibid., 3.

limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified.”¹¹ Drawing on Locke’s conception of the state of nature and the laws of nature, individuals are entitled to many things, including the rights to “life, health, liberty or possessions”¹² The inconveniences of individuals protecting these things themselves will, on Nozick’s account, lead first to mutual-protection associations and eventually to dominant protective agencies and finally to the state, which wields a complete monopoly on enforcement power over some geographic region. Thus, individual rights are protected. The central concern of a Nozickian state is protection of the complete set of natural rights, not just the distributive property rights of individuals. What can the state do to protect the complete set of rights? I will argue that the state may do a lot, at least as concerns borders.

Nozick’s justification for the state is complex and doesn’t rely solely upon the inconvenience of individuals protecting their own rights. In the step from the ultraminimal state to the minimal state Nozick considers the problems that result from having members and nonmembers of the protective association residing within the geographic area for which the protective association is responsible. What happens when this group of nonmembers chooses to exercise its natural rights of enforcement upon members? If the means of enforcement are appropriate and reliable there is no problem. However, in the case in which those means are not reliable, or are not known to be reliable, a rights violation for the protective association’s member might occur, one which the protective association is obligated to protect against. Nozick uses this problem to engage in a general discussion regarding border crossings.

¹¹ Ibid., ix.

¹² Nozick, 10; John Locke, *Two Treatises of Government*, in *Two Treatises of Government and A Letter Concerning Toleration*, edited by Ian Shapiro (New Haven: Yale University Press, 2003), 102.

A border crossing occurs when a person's natural rights are violated without prior permission. The sense of border used here is not that of a boundary between countries, but involves the moral space that surrounds individuals in which others are not permitted to act.¹³ An action that under some circumstances would be considered a border crossing is not a border crossing if prior permission is obtained. Some border crossings in which permission has not been obtained prior to the crossing can be set right by providing the victim with compensation such that the victim is no worse off than he otherwise would have been. Although this simple set of conditions is straightforward, meeting them is often not. Permission to violate may not always be obtainable because either the victim is unavailable or the victim is unknown or cannot be individually identified. Compensation poses problems because it may not be possible to adequately determine the amount of compensation required or the perpetrator of the border crossing may not have adequate resources to compensate the victim. In many cases it will not be possible to identify the perpetrator after the fact. Nozick's concern is whether protective association can prevent actions in such circumstances. The conclusion is that the protective association can prevent such actions, because of the risk and fear that the possibility of such border crossings creates.¹⁴ People living under the threat of border crossings, as a part of natural human psychology, experience fear because of what *might* happen. Even in a system which requires compensation for these kinds of border crossings, people still experience fear because of the risk that the perpetrator won't be identified or be able to compensate or the harm might be greater than expected. This

¹³ The natural rights held by a person create a kind of sphere, or boundary, in which the person is permitted to act and others are not permitted to act. "A line (or hyper-plane) circumscribes an area in moral space around an individual." Nozick, *Anarchy, State and Utopia*, 57.

¹⁴ Ibid., 69.

“argument from fear” focuses upon the fear of being harmed as well as the result of a system that permits such harm, individually and across the community. Nozick writes, “The argument from general fear justifies prohibiting those boundary-crossing acts that produce fear even when it is known that they will be compensated for.”¹⁵

There are also circumstances in which actions might not create a border crossing but bear the risk of a border crossing. Such cases might apply to single actions or to cases in which any single action contains low risk, but the risk of a border crossing and the associated fear, grows as a result of repeated actions. In either case, Nozick concludes that the protective association can prohibit actions that possess these kinds of risk. The caveat is that the person who is prevented from acting must be compensated for the disadvantage that results from being prohibited from acting: “those who are disadvantaged by being forbidden to do actions that only *might* harm others must be compensated for these disadvantages foisted upon them in order to provide security for the others.”¹⁶

With this understanding of the permissible actions of Nozick’s state, it will be useful to consider some examples of border crossings of the kind involved in the open borders debate. Consider an example of this form. A wants to enter country Z in order to buy or sell X from, or to B, a member of country Z. This is a fairly nonproblematic case. Carens claims that the Nozickian state would be prevented from acting in this case because preventing A’s entry would violate the rights of both A and B to enter into voluntary exchange, rights they hold as individuals, not as citizens. Any action the state takes to interfere with the voluntary exchange must be based upon a rights violation. So,

¹⁵ Ibid., 71.

¹⁶ Ibid., 83.

as long as A doesn't steal, trespass, defraud or commit any other action that violates a right of any member of country Z, A is permitted to enter the country. If some other member of Z, say C, is disadvantaged by A entering the country because A takes B's business away from C the state cannot take action so long as the exchange between A and B is voluntary. No one has the right to be protected from competitive disadvantage whether citizen or not.¹⁷ I want to argue, however, that there are other cases in which the state is justified in acting, and if it is justified in acting in these cases it is also justified in acting in the first case as part of its justifiable actions in these other cases. Consider any of the following cases:

- A wants to enter country Z to kill B.
- A wants to enter country Z to steal from B.
- A wants to enter country Z to destabilize Z.

Each of these cases warrants preventing the entry of A into Z on either mine or Carens' account of the Nozickian state because they violate the rights of individuals the state should protect. The problem in each case is determining the intentions of A prior to entering Z. This cannot be known without stopping A for questioning. Such a method is not foolproof, but the failure to do so, especially in certain conditions may increase the amount of risk and fear felt by members of the state. This risk and fear justifies the border controls, not only in these circumstances, but also in the circumstances of the case presented by Carens. For it cannot be known which of the cases is present without applying controls to each case. Hence, rather than an argument for open borders, it appears that an argument based upon Nozick's ideas¹⁸ supports an argument for the

¹⁷ Carens, "Aliens and Citizens," 253.

¹⁸ Nozick never directly addresses the problems of migration within his theory.

implementation of border controls thereby, closing borders to the kind of free movement Carens envisions. That the current international scheme provides no compensation for those disadvantaged by it doesn't undermine my argument that Nozick's state can control international migration; it only means that the current system doesn't comply with Nozick's conditions for such control.

The problem with Carens' argument regarding Nozick is that it focuses upon one narrow section of Nozick's theory to demonstrate that Nozick supports open borders. I have argued that this approach does not work because it is the wrong interpretation of Nozick. The Nozickian state may exercise power to prevent harm and protect the individuals within the state. This power may include preventing border crossings that cause harm or create fear through the risk of causing harm. Preventing border crossings that cause harm may require controlling the borders of the state and may include a variety of common immigration policies such as performing background checks in advance of entering, limiting stays, limiting activities or requiring documentation such as passports or visas.¹⁹

Let me now turn briefly to the base argument for which Carens uses Nozick as representative. Recall that the argument is, "It's our country. We can let in or keep out whomever we want." Rather than understanding this argument as being about the exercise of property rights, it should be understood as an argument about sovereignty and control over a recognized geographic entity. This argument is most reasonably understood as nothing but an assertion of Westphalian rights. In Nozickian terms this appears to be equivalent to the claim of monopoly of force that turns the dominant

¹⁹ It is worth noting that this understanding might also serve to limit internal movement for similar reasons.

protection agency into a state.²⁰ It is not a claim based upon what a group of people can do with their property, but rather a claim about what a political institution can do in exercising its rights within an established international order. Admittedly, in the context of a discussion about the justifiability of border controls and exclusion, it is question begging.²¹ It assumes that states have the right to control borders in arguing that states can control their borders to keep others out. But without any mention of property or individual property rights in the argument, Carens has overreached to interpret this popular argument in terms of Nozick. It is more plausibly an argument about control, rather than holdings.

If my arguments in this section stand, then I have weakened the support for the conclusion regarding open borders in Carens' common conclusion argument. Let me turn now to the premise of the argument regarding Rawls.

Rawls, Justice as Fairness and Borders

The broad structure of Rawls' justice as fairness is well known. Individuals in the original position, behind the veil of ignorance, choose the principles of justice to be used to shape their society. Two principles would be chosen. The first principle is a system of equal liberties for all. The second principle establishes that offices and opportunities shall be open to all under conditions of fair equality of opportunity and that differences in economic distributions shall be permitted only if to the benefit of the least advantaged. Rawls' doubly hypothetical statement of the social contract has received widespread acceptance and holds wide appeal within liberal political philosophy. For Rawls, the

²⁰ Ibid., 23-24.

²¹ As is noted by Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000), 154.

scope of social justice is bound by the borders of domestic society. Social justice is to be achieved within the state, not between states. This constraint has long been questioned²² and Carens will set it aside in order to utilize the Rawlsian approach to domestic justice on an international scale.

Carens' application of justice as fairness to the problems of borders and immigration focuses upon four aspects of Rawls' theory. The first relates to the scope of justice, the already mentioned domestic vice global constraint. The second relates to the principles and rights which people would choose behind the veil. The third problem relates to freedom of movement, which Carens argues would be chosen behind the veil. The fourth concerns Rawls' public order constraint, which might be used to constrain freedom of movement.²³ I will examine each of these in turn.

The scope of justice in Rawls' thought has long been debated. Rawls limited the scope of justice to domestic society, principally because it is the effective reach of social institutions. Because institutions are based within the state, their reach is bounded by state borders. By agreement nations may extend their commitments to justice beyond their own borders, but it is by agreement only. There is no manner of effectively implementing social institutions across all societies. Carens, however, claims that the ideas that make justice as fairness appealing at the domestic level also make it appealing at the global level. The Rawlsian principles of justice should be extended outside the

²² For example, see Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979) and Thomas Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989).

²³ Whelan has expressed similar views regarding choices as they relate to the principles of justice and added to this the perspective of equality of opportunity which is neglected by Carens. See Frederick Whelan, "Citizenship and Freedom of Movement: An Open Admission Policy?," in *Open Borders? Closed Societies?: The Ethical and Political Issues*, edited by Mark Gibney (Westport, CT: Greenwood Press, 1988), 7-10. For more on liberal requirements of equality of opportunity see Simon Caney, "Cosmopolitanism Justice and Equalizing Opportunity," *Metaphilosophy*, 32(2001): 13-34 and David Miller, "Against Global Egalitarianism," *The Journal of Ethics* 9(2005): 55-79.

boundaries of the state.²⁴ There are two aspects to this appeal. The first relates to conditions of interaction between societies. When people interact with one another across borders, justice as fairness should raise questions about the fairness of the context in which such interactions take place. Other practices that include the reach across borders, such as the violence of war, require justification. This justification of state practices should be required of all cross border interactions. The principles that apply domestically seem equally relevant at the international level if all people are free and moral equals.

The second aspect appeals to the conditions of the social contract. The purpose of the veil is to eliminate the arbitrary effects of “social contingencies and natural endowments.” Citizenship is a social contingency with significant effects on people’s lives, effects profound enough that Carens likens them to the problems associated with feudalism: “Citizenship in Western liberal democracies is the modern equivalent of feudal privilege – an inherited status that greatly enhances one’s life chances.”²⁵ In feudalism an individual has few options for rising above the status of their birth: born a peasant, always a peasant. Just as political theory has come to realize the immoral nature of that kind of birth constraint, so also should we come to realize the immoral nature of the birth constraint known as citizenship. The effects of citizenship should be eliminated.²⁶ If we are to take seriously a moral commitment to the free and equal status of persons, we should commit to a global original position, wherein all persons are behind the veil of ignorance.

²⁴ Note that Rawls himself denied this approach in work after this idea of globalizing justice as fairness became common. See John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999).

²⁵ Carens, “Aliens and Citizens,” 252.

²⁶ Rawls did not embrace this extension of his thought. The concept of citizenship is important throughout *The Law of Peoples*.

What would people choose behind the veil? Presumably they would start by choosing the same two principles of justice that were chosen under the domestic constraint. Appropriate institutions would be designed to implement the principles in a global context. The crucial question raised by Carens is whether a system of states would be part of this system of institutions. There is no reason why a system of states would be chosen, or, that if it were chosen, that states would possess the same powers they do currently. Carens is willing to grant that people might choose to create states as a result of linguistic, historical and cultural differences, but not for any other reason. Whatever powers the states possess will be constrained by the two principles of justice. States will not have the same kind of power they have today. But this is not all. Carens questions whether people in the original position would claim freedom of movement between states as a right which can be demanded of states. Freedom of movement is instrumentally valuable and guaranteed within the state. Whatever reasons justify unconstrained movement within the state would also justify unconstrained movement between states. These reasons are not limited to economic prosperity, but also include opportunities for marriage, recreation and other social activities. If this is the case, then people in the original position will choose as a basic right a principle of freedom of movement that permits them to move between these cultural states. Freedom of movement is on par with the right of religious freedom. This commitment to movement is the most effective means of eliminating the arbitrary effects of citizenship.²⁷

²⁷ Joseph H. Carens, "Migration and Morality: A Liberal Egalitarian Perspective," in *Free Movement: Ethical Issues in the Transnational Migration of People and of Money*, ed. by Brian Barry and Robert E. Goodin (University Park, PA: The Pennsylvania State University Press, 1992) offers a more thorough discussion of the argument from freedom of movement and is discussed below in this chapter.

A final problem arises. Rawls permits that some liberties might be constrained in order to provide a similar scope of liberty for others, or when the need arises to maintain public order. This latter constraint has been labeled the “public order restriction.”²⁸ The realization of justice through the application of the principles of justice by each member of society requires stable social conditions. When these conditions become unstable, the state may restrict the exercise of rights in order to restore or maintain public social order. Carens’ worry is that this restriction might justify closing borders if misapplied. Rawls’ conditions for these kinds of restrictions, however, are very tight. The threat must be actual (“reasonable expectation”) rather than hypothetical and any restrictions implemented are limited to those required to preserve or restore public order. In the case of immigration, this means that society must be truly overwhelmed by immigrants in such a manner that society is breaking down. Further, the breakdown cannot be due to a negative reaction against the immigrants. It must be that the ability of social institutions to function is undermined. In an ideal world where a global difference principle is operative and has eliminated much of the discrepancy in social well-being, Carens believes that the possibility of such a threat is negligible.

Carens’ global justice as fairness, which includes cultural states, will permit constraint of movement only in the condition that the intent of a person is to overthrow functional and just institutions. All others will be permitted to move, with priority of movement granted, in accordance with a global difference principle, to those who have been denied basic liberties (of the first principle). Carens’ conclusion is that “ideal theory

²⁸ John Rawls, *A Theory of Justice*, Cambridge: Harvard University Press, 1971/1999 rev. See §34 and 35 for Rawls’ discussion regarding the intolerant, public order and restrictions on liberty.

holds up the principle of free migration as an essential part of the just social order toward which we should strive.”²⁹

Each of the four points Carens emphasizes is intended to demonstrate that Rawls’ theory of justice supports a claim for open borders. However, I do not believe this is the case, and for each of the four points there are reasons not to interpret Rawls in the way in which Carens does. I will address each one in turn.

The problem of the scope of justice is not a new problem and is one which has long been debated. Rawls’ own argument against expanding the scope of justice in *The Law of Peoples*, including the desire of peoples to create different kinds of society, is useful here, although it should be noted that these arguments were not available at the time of Carens’ early work. Holding all societies to the same standard denies the opportunity of people to develop different lives, although Rawls would not grant that just any type of society is acceptable.³⁰ As each society develops institutions appropriate to its own vision of the good life it will be difficult to justify their active reach into other communities. There is a second reason to reject this first claim of Carens which is simply that once the scope of justice is expanded to encompass the globe and all peoples, the problem of borders has been dissolved because there are no borders. Even with Carens’ cultural states, the problem is nonexistent because these states do not have the kind of power that creates the problem. A state whose purpose is to foster and protect language and other cultural elements is an emaciated state, without the important purposes and powers traditionally associated with the state. A state that doesn’t provide security, manage economies or provide for social well-being won’t encounter any of the

²⁹ Carens, “Aliens and Citizens,” 262.

³⁰ Rawls, *Law of Peoples*, 17-18, 23-25.

challenges or concerns that immigration presents in these areas. By changing the scope of justice, Carens doesn't demonstrate why borders should be open between autonomous political entities; rather, he simply does away with the problem by changing the context of the discussion.

The elimination of the difference between domestic and international justice through the elimination of a system of states appears to make the second and third concerns of Carens to be without force. On the one hand, it seems unreasonable to think that an original position that encompasses the entire world would be any different than what Rawls specifies in *A Theory of Justice* since it is based upon a shared human nature, unless for some reason the characteristics of people are different. But Carens offers no reason to believe that this is the case. Rawls does not specify a principle of freedom of movement as part of the basic liberties in either *A Theory of Justice*³¹ or *Justice as Fairness: A Restatement*.³² Rawls' commitment to freedom of movement is made explicit only in *Political Liberalism*³³ where it is mentioned as part of the basic liberty regarding personal integrity.³⁴ It is mentioned again as part of the second principle regarding distributive justice related to equality of opportunity.³⁵ In those contexts

³¹ Rawls, *Theory of Justice*, 61/53 rev. The list of basic liberties is "political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of person...; the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law."

³² John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001), 44. The list of basic liberties is "freedom of thought and liberty of conscience; political liberties...and freedom of association; as well as the rights and liberties specified by liberty and integrity (physical and psychological) of the person; and finally, the rights and liberties covered by the rule of law."

³³ John Rawls, *Political Liberalism*, expanded edition (New York: Columbia University Press, 2005), 228, 291. Here the list of basic liberties is "freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law." In other places Rawls associates freedom of movement with equality of opportunity where it is related to the second principle as a problem of distributive justice rather than an issue of basic liberty.

³⁴ *Ibid.*, 232, 335.

³⁵ *Ibid.*, 228.

movement is regarded not as basic in itself, but as supportive of the integrity of the person and equality of opportunity. Such movement is context dependent in ways which Carens ignores.³⁶ A person doesn't have an absolute freedom to move, but will find that freedom bound by a system of similar liberties for all, a problem I will take up later in this chapter.³⁷

Finally, Carens misinterprets the public order restriction in Rawls. In §34 of *A Theory of Justice* Rawls' concern is with problems caused by the liberty of conscience and the problem of tolerating the intolerant. Liberal societies must tolerate the intolerant so long as their existence does not threaten the order of society. This is, as Rawls notes, because there is a "common interest in public order and security."³⁸ This common interest of the representative equal citizen relates to individual interests and life plans. Citizens have an interest in the government maintaining an environment in which individuals can pursue their interests. If the liberty of conscience undermines this order then liberty might be constrained. Carens misinterprets the public order restriction here in the scope of its application. Despite this misinterpretation of Rawls by Carens, it isn't unreasonable to apply this concept to other aspects of the public order than the intolerant. Various other problems as well, such as civil disobedience, might affect the public order in ways that upset the environment and affect all citizens. Granting that this restriction might reasonably apply to the problems of immigration brings us to the problem of what is reasonably certain or imminent. Carens holds that no amount of movement will ever

³⁶ Generally, discussion of the principle of the freedom of movement ignores the context in which the movement occurs. See the section "Freedom of Movement and Open Borders" below.

³⁷ Rawls, *Theory of Justice*, 203/178 (rev). Rawls distinguishes between regulation and restriction noting that "The best arrangement of the several liberties depends upon the totality of limitations to which they are subject." Text is different between the two editions with the text from the revised edition cited in this note.

³⁸ *Ibid.*, 212/187 rev.

unsettle the public order. Yet it is plain from cases of refugee movement, that large numbers of new immigrants for which plans have not been made, can threaten the public order, if in no other manner than by overwhelming the resources available to support them.³⁹ Other migrant movements might also threaten the public order. In fact, this is precisely the claim made in the current American debate. The claim is that there are such a large number of immigrants that social support networks are stretched thin and forced to supply services to a free-riding population. Whether this is actually the case is an empirical matter and the data is mixed. What is relevant for my argument is that the claim is being made that the public order is threatened and threatened in ways that are different than tolerating the intolerant. The effects of immigration under consideration are substantively different than those involving toleration of the intolerant because they potentially prevent the state from functioning as it should, thereby, meeting the Rawlsian condition for restricting liberty. If the public order is threatened then Carens' claim that these conditions cannot arise is wrong. They have in fact arisen. If this is the case, then border controls limiting people's liberty might be justifiable. One could argue further that the long term maintenance of these border controls is justifiable to ensure that the circumstances don't occur again.

If my arguments in this section stand, then I have weakened, again, the support for the conclusion regarding open borders in Carens' common conclusion argument. Let me turn now to the premise regarding utilitarianism.

³⁹ Consider the influx of Tunisian and Libyan refugees into Italy during the 2011 revolutions. The refugees overwhelmed Italy's ability to provide food and shelter, leading Italy to grant them residency to the state and thereby permitting the refugees to move throughout the European Union, against the wishes of other European Union members. Rachel Donadio, "Italy Lashes Out at European Union Over Immigrants," *New York Times*, April 11, 2011 and Rachel Donadio, "Fears about Immigrants Deepen Divisions in Europe," *New York Times*, April 12, 2011.

Utilitarianism and Open Borders

Utilitarianism, in its simplest formulation, seeks the greatest good for the greatest number through the production of pleasures and the reduction of pains across the affected group of people. Once those affected by any action have been identified, the increase in pleasure and the reduction in pain that results from an action can be summed and the morality of the action determined. It is this simplistic expression of utilitarianism that Carens uses. Applied to the problem of immigration, Carens focuses upon the economic gains for impoverished people against the economic losses of those in prosperous countries and concludes that it is likely that a utilitarian calculation of an open border policy will result in an increase in the total amount of good across those affected. Admittedly, some citizens will be harmed as others gain, but this will be greatly outweighed by the benefit to noncitizens at being able to move from poor to prosperous countries. This will be the case even if we factor in the effects upon cultures. Cultural gains from the mixing of cultures are likely to outweigh the loss of cultural characteristics due this mixing. It is also not clear which aspects of lives, besides the economic features, should be utilized. Regardless of how wide we make the scope of the utilitarian calculus, the gains will be positive and therefore, count for open borders.

This general calculation may be strengthened with a second calculation of a rule-based format. Most migrants are economic migrants, that is, they move for economic benefit. Classical economic theory indicates that economies perform better when there is free movement of capital, resources and labor. By permitting the market-based exchange of these components, markets generate a greater total output than they would if they are more tightly managed. Free movement of this sort requires open borders. Therefore, we

must have open borders if we are to maximize economic output. We now have both act and rule utilitarian calculations in support of open borders.

There are problems in Carens' use of this simplistic view of the utilitarian calculation. The first problem is the focus solely upon economic goods without regard for any of the other kinds of goods that count. These goods, especially the "higher pleasures"⁴⁰ associated with the cultivation of humanistic and artistic capabilities will be affected by migration in ways that Carens simply does not consider. Throughout the world today there are concerns about the protection of languages and cultures against the forces of globalization, especially when these are held by small groups. It may be that the pleasures associated with these goods would not outweigh the benefits to noncitizens, but without considering them the calculation is insufficient. A further problem is that utilitarianism calculates from individual pleasures and pains across a group affected by an action rather than from group measures. Carens' approach relies upon a group measure (gross domestic product (GDP)) as indicative of individual pleasure. It is not the case that GDP reflects in a meaningful way the pleasures and pains experienced at the individual level and is not reliable in all cases. In the economic recovery from the 2008-2009 recession national GDPs, corporate profits and economic productivity were climbing at the same time that individual welfare was still in decline. Given this situation, a utilitarian could question the usefulness of GDP as a measure of individual utility. An additional problem is the role that pragmatic judgment has in utilitarian assessments. Given a particular set of facts regarding benefits, different weights will be placed upon the value of these benefits, resulting in a different assessment of the

⁴⁰ John Stuart Mill, *Utilitarianism*, in *On Liberty and Other Essays*, edited by John Gray (Oxford: Oxford University Press, 1991), 140.

circumstance. Utilitarian calculations to be shared across large groups of people require some agreement about the rankings of the goods generated to reach any conclusion that would be widely shared.

Additional evidence for the complexity of this kind of utilitarian calculation that Carens ignores is manifest in what has become known as the “brain drain hypothesis.” In this kind of circumstance, the emigrants who leave a country create holes in the social network they leave behind because they take their important skills with them. Examples of this include estimates that the Philippines has a nursing shortage even though it trains an adequate number of nurses, because 85% of them work overseas for better pay and the emigration of physicians from sub-Saharan Africa to the prosperous countries of Europe.⁴¹ The negative impact of these movements must be involved in the calculation. The other end of the brain drain hypothesis is the “crowding out effect” in which locals lose work to immigrants because there are more people looking for work than the number of positions available. Carens assumes that this effect will be positive, but this is not always the case. Balancing these labor forces in practice, rather than theory is likely to be a very difficult pathway, and it is not obvious this will always lead to a positive calculation of utility. If this is the case, utilitarian arguments may actually lead to an argument for closed borders in some cases. Certainly, the security provided by controlled or closed borders also would count for something in utilitarian calculations and dependent upon the facts of particular circumstances, such as immediately post 9/11, may count for quite a bit in the calculation, creating an even stronger utilitarian argument for controlled borders.

⁴¹ Nir Eyal, “Physician Brain Drain: Can Nothing Be Done?,” *Public Health Ethics* 1(2008): 181.

Finally, Carens appears to miss the irony of appealing to a utilitarian morality which will compromise the liberal principles that originally led him to the open border conclusion. Rawls thoroughly rejects the relevance of utilitarian thought for liberal political communities because of the likelihood of violation of the first principle of justice.⁴² The account of economic utilitarianism has also recently been forcefully critiqued by Nussbaum.⁴³ If these critiques are sound, then the utilitarian calculation must be rejected. The claim that the calculation is far more complicated than Carens envisions and is more likely than he expects to lead to a closed borders argument is not a claim that aliens don't count or don't count equally. In fact, the approach I have outlined takes into account a more robust picture of the world and gives full recognition to all aspects of their lives, not just their economic lives.

At this point I have undermined each of the key premises in Carens' common conclusion argument sufficiently to claim that the common conclusion argument is inadequate to justify the claim that liberal political philosophies must support open borders. This is not, however, the only criticism that might be applied to Carens.

Other Critiques of Carens

The open borders arguments of Carens have become representative of contemporary liberal political philosophy with little critical assessment. They are routinely cited as canonical. Joseph Meilaender has written, to my knowledge, the sole critical assessment of Carens' work. Meilaender's critique is substantively different than the critique I have offered to this point, and therefore, requires review.

⁴² Rawls, *Theory of Justice*, 183-192/160-168 rev.

⁴³ Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Harvard University Press, 2006), 71-74, 281-284.

In two related works Meilaender offers a critique of Carens. The first, and most substantive, is in “Liberalism and Open Borders: The Argument of Joseph Carens.”⁴⁴ The second, more recent but less substantive, occurs in his book *Toward a Theory of Immigration*.⁴⁵ Meilaender acknowledges that Carens’ argument is built upon a solidly liberal foundation. However, this foundation is undefended. This creates a kind of confusion about his work. Is Carens arguing for a view to which only liberals are committed or does the view have wider reach such that all countries, regardless of philosophical commitments, should be committed to open borders?⁴⁶ If Carens intends his argument to apply to all governments, regardless of commitments, then Carens must provide an argument for why the commitments of liberalism should prevail over other kinds of commitments. On the other hand, if Carens intends his argument to apply only to liberal governments, then he has failed to acknowledge and resolve the great differences in the views that liberals hold regarding borders. Why is Carens’ view regarding borders the correct view rather than the ones held by Steiner, Walzer or Miller? In either case, this makes Carens’ argument incomplete. Meilaender writes:

However we choose to understand it, then, Carens’s [*sic*] argument remains incomplete. If it is really only intended as an argument for people who are already liberals, then the reader expecting a case for genuinely open borders is bound to be disappointed; furthermore, it then seems obliged to return to and address the broad, continued disagreement within liberalism. If, on the other hand, it really is what it claims to be, an argument for open borders, then we must conclude that its reliance on and reflection of certain liberal principles and certain interpretations of them, even, leave it with little to say to countries that do not already share these principles. One of the two arguments is incomplete: either the argument

⁴⁴ Peter C. Meilaender, “Liberalism and Open Borders: The Argument of Joseph Carens,” *International Migration Review*, 33(1999): 1062-1081.

⁴⁵ Peter C. Meilaender, *Toward a Theory of Immigration* (New York: Palgrave, 2001).

⁴⁶ Another question Meilaender raises is whether Carens intends, as a byproduct of his approach, to claim that only governments that hold liberal commitments are legitimate governments. Meilaender, “Liberalism and Open Borders,” 1077.

about liberalism and its implications, or the argument for liberalism and its principles.⁴⁷

I am not convinced that these problems cause Carens' argument to suffer in ways that undermine it significantly.

Carens argument begins from liberal principles, a point which Meilaender readily concedes. These principles, although not always well defined, are well known. They provide a starting point for theorists to explore what a community would be like if it shared and applied this particular set of values. Carens' argument claims that open borders is the correct position for liberal communities to hold. But his argument intends to reach farther than just liberal communities. It does apply to all countries. In 1992, regarding human rights, Carens writes "From a liberal egalitarian perspective all states are obliged to respect such rights..."⁴⁸ Liberal philosophy is committed to pluralism, but pluralism within liberalism, not a pluralism that lies outside liberalism. Pluralism outside liberalism would deny the universal aspect of liberal principles. Once the broad commitments of liberalism are recognized, then the acceptance of many conceptions of the good life, or comprehensive doctrines in Rawls' words, is required. But these conceptions of the good life cannot lead to the rejection of the political world envisioned by liberalism. Although in the nonideal world, Carens owes us an argument for why nonliberals should accept the liberal conclusions regarding borders and immigration, this ideal work does not require it. The perspective of the nonideal world is a larger, more difficult argument to make, and lies outside the requirements of Carens' project. That Carens is making an argument about open borders from the perspective of liberal political philosophy is recognition that there is, or might be, disagreement over what the correct

⁴⁷ Ibid., 1079.

⁴⁸ Carens, "Migration and Morality," 36.

conclusion might be from this perspective. Carens is arguing that open borders *should* be the conclusion regarding borders that extends from liberal principles. This is a matter in which there is no possibility of pluralism because justice demands open borders. I am not persuaded that Meilaender's critique undermines the argument of Carens if the limited scope of Carens' project is properly understood.

Open Borders and Single Principle Arguments

Freedom of Movement and Open Borders

The work of Carens discussed thus far, represents his first approach to the problem of liberal egalitarianism and borders, one about which he has expressed some uncertainty and hesitation.⁴⁹ In a subsequent work, "Migration and Morality: A Liberal Egalitarian Perspective," Carens develops an argument based upon the principle of the freedom of movement that he believes is not subject to the problems of the consensus argument. In this argument his claim is that, "Liberal egalitarianism entails a deep commitment to freedom of movement as both an important liberty in itself and a prerequisite for other freedoms."⁵⁰ Therefore, movement should be as unrestricted as possible and the burden of justification rests with those who would place restrictions upon it. Carens makes no attempt in his argument to take account of the complexity of the idea of freedom of movement and how it might legitimately be constrained. I will take up this issue in more detail below.

The basic structure of Carens' arguments looks like this:

⁴⁹ Carens writes regarding his work in "Aliens and Citizens": "I felt somewhat ambivalent about the argument, uncertain whether it revealed a deep moral problem with the exclusionary practices of liberal states (which was the view I emphasized in the article) or the limitations of abstract liberal theory (which was a concern I pursued in subsequent work). At this point I think that both are true to some extent." Joseph H. Carens, "A Reply to Meilaender: Reconsidering Open Borders," *International Migration Review* 33(1999): 1082.

⁵⁰ Carens, "Migration and Morality," 25.

1. Liberal egalitarians care about human freedoms, such as the ability to pursue individual projects.
2. Liberal egalitarians care about equality of opportunity with access to social positions determined by talents rather than arbitrary characteristics.
3. Liberal egalitarians seek to keep actual inequalities (economic, social, and political) as small as possible.
4. Freedom of movement is necessary for achieving each of these liberal egalitarian goals.
5. Therefore, liberal egalitarians support unrestricted freedom of movement.

Although Carens claims that freedom of movement is important in itself, the argument provided finds value only in its instrumental characteristics. Freedom of movement is important because it is required to achieve other goals that liberal egalitarians care about. If those goals could be achieved through other means, then it is unclear from Carens' argument whether we would still care about freedom of movement. It also needs to be recognized that the first three claims in the argument are not absolute. The first claim is limited by the recognition that individual projects are constrained by the requirement that these projects not interfere with the legitimate claims of other individuals to likewise pursue their own projects. Individual projects may be constrained because of their effects upon others. I have also glossed over the nuances of the relationship between freedom of movement and the concerns of liberal egalitarianism. Carens has expressed the relationship as "closely connected" for the pursuit of individual projects, "essential" for equality of opportunity, and as "would contribute" to achieving various types of equality in the world. My restatement of these as necessary might be too strong. Nonetheless,

although my use of “necessary” might be stronger than his claim, it represents in a reasonable manner the full force of Carens’ argument. Freedom of movement is necessary for the achievement of liberal egalitarian concerns, and denying such freedom undermines the central concerns of liberal egalitarianism.

To this main argument, Carens adds four additional reasons why liberal egalitarians should care about freedom of movement that are tied to illiberal consequences of not supporting freedom of movement. The first is the feudal practice argument which was also mentioned as part of the common conclusion argument. Restricting movement across borders because a person is born in one country rather than another is like the constraints placed upon an individual’s life in feudalism. Carens writes: “Citizenship in the modern world is a lot like feudal status in the medieval world. It is assigned at birth; for the most part it is not subject to change by the individual’s will and efforts; and it has a major impact upon that person’s life chances.”⁵¹ In feudalism a person’s prospects in life were largely determined by the status a person was given at birth. Born into a landed aristocratic family and one could expect to do fairly well. Born into a peasant family bound to a lord and one’s life prospects were greatly limited. Liberal egalitarians object to feudal practices, so also, they should object to constraints on movement which are bounded by one’s citizenship as established at birth.⁵²

A second reason offered is the problem of the asymmetry of the right to exit and the right to enter. The right to exit (and return) is enshrined in international documents of

⁵¹ Ibid., 26.

⁵² In making this argument Carens does not appeal to the idea that citizenship might be arbitrary because it is an element of one’s social circumstance. In this piece the focus is upon the lack of autonomy one had in feudal practices. In “Aliens and Citizens” Carens does appeal to citizenship as an arbitrary fact of one’s social circumstance. This argument was discussed in the preceding section.

human, civil and political rights.⁵³ But it is possible that the right to exit might be only formal, rather than substantive. Consider the case where an individual has both the desire and the means to leave a country but cannot do so because all countries refuse entrance. The right to exit is meaningless for this individual, indicating that an unrestricted right to exit without a corresponding unrestricted right to enter is meaningless. If both rights are required for the rights to be meaningful, then liberal egalitarians must support unrestricted movement. The failure to do so is to treat people illiberally and make their rights meaningless.

A third reason, for which Carens offers no justification, is that individuals should be able to change their citizenship at will, a position known as *jus nexi*. Carens defends the practice of granting citizenship based upon birth (*jus soli*) as being required as part of a community's recognition of ties to others. But this initial determination of citizenship should not constrain the ability to change one's citizenship as one desires.

The final reason offered is the comparison of internal movement to external movement. Within most countries in the world a person is free to move within the boundaries of their country and the right of internal movement is contained in international rights documents.⁵⁴ However, most of the reasons that motivate people to move within a country also might motivate people to move internationally. People fall in love, seek new jobs, or seek new associations. If the motivations for internal and external movement are the same then the right to move should also be the same. Like the right to exit and return, movement within states is often treated as a moral imperative and

⁵³ See Universal Declaration of Human Rights, Article 13; International Covenant on Civil and Political Rights, Article 12.

⁵⁴ See Universal Declaration of Human Rights, Article 13(1); International Covenant on Civil and Political Rights, Article 12 (1).

necessary civil right. The treatment of external movement as a matter of national political decision is therefore, unjustifiable.

This freedom of movement argument, like the common conclusion argument, is problematic in many ways. The most significant problem in the argument is that Carens has failed to give careful consideration to what the principle of freedom of movement is. Before I turn my attention to that substantial problem, however, I want to address the other reasons Carens offers. The feudal practices analogy is only partially effective because Carens overplays the comparison. Feudal practices were much more stringent than contemporary practices restricting international movement. Feudal practices might keep one from moving from one village to another or even retaining the fruit of one's labor.⁵⁵ Feudal constraints were based upon the ties between individuals requiring permission from the ruling individual for movement to occur. International constraints on movement do not carry these same kinds of constraints. Constraints on movement, where they exist in contemporary society, are not tied to movement but to other aspects of the constraining society, such as security or issues of social welfare. The permission required to move is granted by states rather than a single individual whose own well-being is affected by movement. Contemporary constraints on movement might be troubling, but it is not because they are comparable to feudal constraints on movement. Individuals today retain far more autonomy over their lives, even in circumstances in which they can't move, than did most individuals in the medieval period. Further, his commitment to a *jus nexi* approach to citizenship overstates the conclusion of his

⁵⁵ Our traditional understanding of feudalism and its affect upon people's lives has been the subject of significant debate over the last 25 years since the publication of Susan Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford: Oxford University Press, 1994).

argument.⁵⁶ One could grant freedom of movement without granting the right to change citizenship at will. Even if one admits that states cannot deny citizenship to individuals who have integrated into the community because it leaves this individual in a disadvantaged position, it doesn't follow that one must be allowed to change citizenship at will. Some requirements might still apply, such as the successful integration into society.⁵⁷

Carens is not alone in criticizing the asymmetry of the right to enter and exit. Leah Ypi, in her recent work,⁵⁸ has also argued that any grounds used to justify limiting entry must also be applicable to exit. But to argue in this manner is to ignore the real effects of movement and the problems caused by the uncoordinated movement of people. As Carens and others readily admit, sending countries are many but receiving countries are few. Large numbers of people moving to the same or a limited number of locations can be problematic. States struggle to provide the social services required to support migrants, both short term and long term. Teaching large numbers of new people a language, laws, or the role of social institutions requires vast resources from a limited pool of resources. There are economic impacts as larger numbers of people compete for a limited number of jobs. The effects of movement and the actions states must take to accommodate such movement are different in sending and receiving communities. This difference justifies treating the two kinds of movement differently, at least in some cases, and perhaps in all cases.

⁵⁶ For more on the *jus nexi* approach to citizenship, see Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, MA: Harvard University Press, 2009).

⁵⁷ For an argument of this type, see Joseph H. Carens, *Immigrants and the Right to Stay* (Cambridge, MA: MIT Press, 2010).

⁵⁸ Lea Ypi, "Justice in Migration: a Closed Borders Utopia?," *The Journal of Political Philosophy*, 16 (2008): 391-392.

Finally, the comparison of internal and external movement also falls short. I have already discussed the problems encountered by Carens in arguing that individuals behind the veil of ignorance would choose to move. If all movement is to be treated the same, Carens is obligated to offer up an account of political authority and obligation that would support such movement. What obligations do immigrants take on when they move? To their old community? To their new community? What rights of authority do states retain over citizens who leave? What rights do receiving states have over new immigrants? It is not the case that one can't be offered; Carens just doesn't offer one. The claim that internal movement between different political jurisdictions within the same country is similar to international movement fails to recognize one significant fact: different jurisdictions within the same larger political jurisdiction have only limited political autonomy. Their actions are subject to the constraints of the national government. Utah cannot limit movement from those in other states because the higher political authority does not permit it. But international movements cross autonomous political jurisdictions that do not answer to any common authority. Their decisions are independent and not constrained by other authority in the way internal jurisdictions are. The parallel between the two kinds of movement are different and Carens must explain how political authority and obligation are to work in this environment. On this problem Bader writes,

The argument by analogy – that international free movement should be treated exactly like internal free movement – is not convincing: it either neglects moral principles of democratic self-determination completely, or it neglects the importance of democratic states among other units in emerging democratic multi-level polities.⁵⁹

Presumably Carens intends for movement between countries to work similar to movement between states, but one can argue that this internal movement works because

⁵⁹ Veit Bader, "The Ethics of Immigration," *Constellations*, 12(2005): 340.

of the shared political authority above the local jurisdictions. Without this shared higher authority in the international arena, it is not obvious that movement can function in the same manner. The governance issues related to shared practices without enforcement authority have been evident in recent years in the European Union in both movement and the euro. Member states determine policy that affects the shared practices without the ability of other states to constrain that policy even as they are affected by it. If we remove the problem by establishing a single authority, Carens cannot make the claim that this condition applies to the case of multiple authorities. Global authorities come in for suspicion in the well known critiques of Kant,⁶⁰ Rawls⁶¹ and others.⁶²

Carens is not the only contemporary theorist to claim unrestricted movement based upon a principle of freedom of movement. Chandran Kukathas, writing from a libertarian perspective, claims an even more unrestricted right to international movement than Carens does.⁶³ Understanding the problems of migration as principally one of competition for state resources between immigrants and natives, Kukathas argues for an unrestricted right to movement as a robust expression of freedom, which entails redefining the modern state. Restricting movement is foremost a denial of freedom and requires a strong justification. People denied the opportunity to move are denied opportunity to create the lives they desire, flee from tyrannical regimes (and if people can't leave, why should these regimes reform), and denies to people their freedom to

⁶⁰ Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch*, in *Perpetual Peace and Other Essays*, translated by Ted Humphrey (Indianapolis: Hackett Publishing, 1983), 124-125.

⁶¹ Rawls, *Law of Peoples*, 36.

⁶² For example, see the lesser known response of Walzer where the concern is the loss of social pluralism. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), 39.

⁶³ Chandran Kukathas, "The Case for Open Migration," in *Contemporary Debates in Applied Ethics*, edited by Christopher H. Wellman and Andrew Cohen, (Malden, MA: Blackwell, 2005).

associate, whether the reasons for association be family, love, work or worship. Denying people these things through the denial of freedom of movement is difficult to defend.

The common reasons offered for denial of movement are, on Kukathas' account, easily rebutted. The economic impacts associated with affects upon employment are difficult to measure. But Kukathas claims, without support, that the effects of immigration are "at best, positive, and at worst, only mildly negative."⁶⁴ If we expand our view to a global perspective, then the effects will be positive as well from the beneficial redistribution of labor throughout the world. While it is possible to quibble over the statistics that might support this claim, Kukathas offers a more extended moral argument related to the economic effects of migration.

People within nations hold a privileged position under the current international system. They have access to a wide range of benefits and opportunities denied to those outside the local political system. These benefits and opportunities are of two types. First, there is access to local economic markets for employment and exchange. Secondly, there is access to state provided benefits, such as welfare. Are such privileges morally warranted? Kukathas claims they are not, because even though opening markets disadvantages natives, those denied access are also disadvantaged. "Restricting access to markets certainly benefits some people, but at the expense of others, and generally to the disadvantage of all. If particular privileges should be accorded to some because of their state membership, the justification cannot be economic..."⁶⁵ Open markets benefit all, closed or control markets benefit a more limited group of people. Markets should benefit all by being open to all. The problem of benefits accorded by the welfare state presents

⁶⁴ Ibid., 212.

⁶⁵ Ibid., 213.

different problems. The main problem to address for the welfare state is the movement of poor people, those who utilize benefits without contributing. This means that at least rich people should have unconstrained movement. But Kukathas believes this is problematic and that the poor should also be allowed to move with the possibility of being excluded from the welfare system. Even though the moving poor are disadvantaged in such a scheme, their lot may be better off than if they were denied the opportunity to move. Kukathas recognizes the difficulties that migration presents for the welfare state and the moral challenges of different levels of membership. The obvious choice for many is to restrict migration. Kukathas raises a different question: “While one obvious response to this is to say, ‘so much the worse for open immigration,’ it is not less possible to ask whether the welfare state is what needs rethinking.”⁶⁶ In other words, if open immigration is problematic for the welfare state, then perhaps it is the welfare state that must change (or go away), rather than open immigration.

Carens and Kukathas both raise significant challenges to closed borders based upon claims of freedom of movement and the associated affects of constraining movement. Claims of equal moral worth for all individuals do raise questions regarding the justification of differential treatment. But one central problem here, is that both Carens and Kukathas rely upon a vague specification of the principal of freedom of movement. I want to turn to that problem now and then revisit their arguments.

Specifying the Principle of Freedom of Movement

⁶⁶ Ibid., 219. For more on this approach, see Chandran Kukathas, “Social Justice and the Nation-State: A Modest Attack,” in *Forms of Justice: Critical Perspectives on David Miller’s Political Philosophy*, edited by Daniel A. Bell and Avner de-Shalit (Lanham, MD: Rowman and Littlefield, 2002). Carens makes it plain: “Preservation of the welfare state does not justify restriction of immigration from poor countries to rich ones.” Joseph H. Carens, “Immigration and the Welfare State,” in *Democracy and the Welfare State*, edited by Amy Gutman (Princeton: Princeton University Press, 1988), 227.

Although I have already offered critiques of the different arguments for open borders based upon a principle of the freedom of movement there remains one significant problem with this argument. There is no specification of exactly what the principle of the freedom of movement is.

For a principle that is so widely appealed to, it is unsettling to be unable to find any conceptual consideration or specification of this principle. It is appealed to with the assumption that its meaning is obvious. This stands in stark contrast, for example, to such principles as the Harm Principle or the Precautionary Principle in engineering. Both of these principles have received substantial consideration resulting in precise characterizations of these principles. Unfortunately, this is not the case for the principle of the freedom of movement.

The following is a common formulation of this principle.

Every person has the right to move from one location to another.

Three things stand out in this claim. The first is that the locus of this right is the individual. It is something each of us has, presumably because we are independent and rational creatures. The second is that this is a right, something which we can claim of others. However, in this formulation it is somewhat uncertain what we can actually claim of others – noninterference, or something more. It is also uncertain of whom it is we should claim this right – simply of others or from institutional bodies. In an apolitical world we would claim this of others; in a political world it necessarily is a claim against both individuals and institutions and governments. Finally, this right is about spatial movement, although it does not require that the space be significant. My exercise of the right occurs whether I move one foot, one mile or half-way around the world. Noticeably

missing from this statement is any consideration of the purpose of my movement or the effect of my movement. A person may move for the most trivial of reasons, to move out of the sun into the shade, or for the most significant reasons, to build a better life.

The principle as stated is the form behind the libertarian commitment to freedom of movement used by theorists such as Chandran Kukathas, and is easily shown to be inadequate. As David Miller notes, there are all kinds of constraints on our ability to move.⁶⁷ I cannot choose to move into the space which you occupy (at least not without interfering with your right to be in that space or the integrity of your body).⁶⁸ More significantly, I cannot move in to your house and make myself at home. Common definitions of private property make such movement inappropriate. If we accept the principle as we have characterized it so far, we are not far from a Hobbesian state of nature. I am free to move wherever and for whatever purposes I wish, constrained only by your ability to prevent me from moving to these spaces. Within civilized society such a principle is not very useful.

Let me offer a modification that takes into account these kinds of considerations.

Every person has the right to move from one location to another provided that movement does not interfere with the prior rightful occupation of that space by another person.

A few comments on this version of the principle are in order. The principle now recognizes that movement should not affect others already in the space to which I wish to move, provided their occupation of this space is appropriate (and perhaps even if the

⁶⁷ David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), 205. See also David Miller, "Immigration: The Case for Limits," *Contemporary Debates in Applied Ethics*, edited by Christopher H. Wellman and Andrew Cohen (Malden, MA: Blackwell, 2005), 195.

⁶⁸ Ypi, "Justice in Migration," also claims that this kind of constraint is not troubling from a liberal standpoint, 394.

occupation of that space is not appropriate). A person cannot move into the physical space I occupy if I am already rightfully there. If I stand on the sidewalk you cannot come and push me aside in order to stand where I was. You cannot move into my dwelling provided that I am rightfully in that dwelling. If my own occupation is inappropriate, then I am without grounds to complain about your occupation of that dwelling. We are both in violation of someone else's right to that property. I can only claim that you not push me from the physical space I occupy. What it means for occupation of a space or a dwelling to be prior and rightful needs exploration beyond my purposes here, other than to say that it at least means chronologically prior and that occupation means my physical presence in some cases, and something other than my physical presence in others.

But there is potentially a problem in this definition as well. Suppose for a moment that I am standing still on the sidewalk. As you walk by you stumble in such a manner that you push me aside and end up occupying the place where I was on the sidewalk. This seems fundamentally different from the case where you intentionally push me from my spot and take it over. While I certainly am not happy about being accidentally removed from my spot, I recognize its accidental nature and hopefully do not take too much offense. In all likelihood you apologize and return my rightful position on the sidewalk to me. But in the intentional case, I take greater offense because of its intentional nature. Although this case is trivial, it seems to point to the idea that it may be appropriate to make intention part of our principle. Distinguishing between intentional and unintentional actions anticipates that our response to the effects of inappropriate movement might be different depending on the intentions involved. Suppose now I

modify the case slightly such that instead of just being pushed aside I am pushed in front of a passing vehicle and suffer injury. Now it is not only intention that comes into play but the consequences (negative) of the action. Even in the case of an accidental push, I want take into account the effect of the action. That I suffer harm, even unintentional, is a relevant factor.

Let me now suggest a new set of revisions.

Every person has the right to move from one location to another provided that movement does not interfere with the prior rightful occupation of that space by another and that movement does not result in either intentional or unintentional harm to others.

I have now built both intentions and consequences of movement into this principle and it is nearly adequate. Two problems remain to address. The first is whether the principle should address intention without effect. This is often the focus of security claims and offered as a reason for preventing someone from entering. It raises significant issues, as intention is often difficult to assess. It is further complicated in that in some cases it may be intentional to move me from my spot, but not to cause harm (assuming the movement itself causes no harm). The other problem remaining to address, looking forward to the problem of migration, is the problem of groups. A principle that is useful for individuals might not be useful when applied to group movement, be it coordinated or uncoordinated. This notion is well recognized in moral and political literature. It is the caveat we find in the phrase “compatible with a similar right for all.” The principle can now be modified into its final form.

Every person has the right to move from one location to another provided that movement does not interfere with the prior rightful occupation of that space by another and that movement is not for the purposes of harming others, does not result in either intentional or unintentional harm to others, either as the result of single actions or cumulative actions, and compatible with an equal right to movement for others.

Carens and Kukathas Revisited

From the perspective of the principle of the freedom of movement just developed, liberal communities do not have to support the unconstrained freedom of movement claimed by Carens and Kukathas. Movement will be constrained in ways that supports a system that minimizes harm to others while still respecting the rights of those who wish to move.⁶⁹ This kind of system requires controls and the opportunity to evaluate the intentions of movement as well as the effects of movement, sometime simultaneous to, and other times in advance of movement. Such a system will utilize empirical data to evaluate how movement effects the functioning of institutions in receiving countries and whether there are resources available to integrate immigrants into new social circumstances. For security purposes the movement of some individuals might be barred, either for specific reasons or because there is inadequate information available to make informed decisions. It does not matter for my argument that this principle might result in different immigration control systems than those in use today. The development of a migration system that responds to the principle of the freedom of movement that I have

⁶⁹ Note that Rawls also limits immigration based upon the responsibility of those moving: “they are to recognize that they cannot make up for their irresponsibility in caring for their land and its natural resources by conquest in war or by migration into other people’s territory without their consent.” Rawls, *Law of Peoples*, 39.

specified here might increase or decrease movement, but it will do so based upon the effects of the movement rather than for other more troubling reasons. What is important for my purposes here, is that the unconstrained principle of movement utilized by Carens and Kukathas cannot be defended from a liberal point of view when it is given close consideration.

Freedom of Association and Open Borders

Other principles beyond freedom of movement are available for use in grounding a liberal argument for open borders. Writing from a left-libertarian perspective, Hillel Steiner has offered at least two principled arguments supporting open borders. Left-libertarianism needs to be distinguished from right-libertarianism (represented by Nozick and Kukathas in this thesis). Both approaches characterize rights as property rights subject to control by the individual understood by the concept of self-ownership. In both accounts individuals own their bodies, their labor and the artifacts they produce using that labor. The difference between the two accounts is evident in the approach to the ownership of natural or raw resources, those things that exist without human intervention. Whereas right-libertarianism holds that natural resources were initially unowned and can be freely appropriated to private ownership in accordance with some principle (e.g., Locke's labor mixing principle), left-libertarianism holds that natural resources are jointly owned by all, including posterity, in an egalitarian fashion. Privatization of natural resources requires compensation to any who are denied access to or use of the natural resources being privatized. Only when such compensation has been paid can natural resources be privatized. Vallentyne summarizes this succinctly: "Left-libertarian theories of justice hold that agents are full self-owners and that natural resources are

owned in some egalitarian manner.”⁷⁰ Steiner’s first argument utilizes the shared perspective of both forms of libertarianism, arguing that the right of freedom of association leads to a commitment to open borders and will be discussed in this section. The second argument reflects the distinct commitments of left-libertarianism, arguing that borders deny people access to their rights to resources and requires either that borders be open or that people be compensated appropriately. This argument is covered in the next section.

In a short passage in “Hard Borders, Compensation and Classical Liberalism,” Steiner argues in rebuttal to Walzer that freedom of association requires that borders be open.⁷¹ Walzer claims that emigration and immigration may be treated asymmetrically because the latter respects the voluntariness of actions, whereas to constrain the former replaces commitment with coercion,⁷² a practice that requires justification in liberal communities. In other words, the decision of immigration, in which the migrant voluntarily decides to leave and the receiving community decides to admit the migrant, is accepted because it is voluntary on the part of both parties. Emigration on the other hand, represents the voluntary decision of a person to separate from the community and denying that separation is to coerce that person into remaining part of the community. The decision to stay is not voluntary. It is a principle of autonomy and respect for autonomy that justifies the distinction between immigration and emigration. Steiner

⁷⁰ Peter Vallentyne, “Introduction: Left-Libertarianism – A Primer,” in *Left-Libertarianism and Its Critics*, edited by Peter Vallentyne and Hillel Steiner, (New York: Palgrave, 2000), 1. See also John Cunliffe, “Introduction: Left-Libertarianism – Historical Origins,” in *The Origins of Left-Libertarianism*, edited by Peter Vallentyne and Hillel Steiner (New York: Palgrave, 2000).

⁷¹ Hillel Steiner, “Hard Borders, Compensation and Classical Liberalism,” in *Boundaries and Justice: Diverse Ethical Perspectives*, edited by David Miller and Sohail H. Hashmi, (Princeton: Princeton University Press, 2001), 80-81. In Chapter 3 I will discuss Christopher Wellman’s extended argument for closed borders based upon freedom of association.

⁷² Walzer, *Spheres of Justice*, 39-40.

believes this argument of Walzer's is flawed because it assumes that all individuals within a community share identical commitments, a condition that is unlikely to obtain in a pluralistic community. Members of the community will hold different levels of commitment to the various values held within the community. In the case where no member of the community desires to associate with outsiders, then Steiner holds it is acceptable for the state to control the borders in a manner that denies entry to all. However, if any member desires to associate with an outsider, denying that member the opportunity to do so is to coerce that member and deny the exercise of freedom. This is unacceptable within a liberal community. Walzer's argument fails because it doesn't recognize the different manners in which members can be coerced. Walzer's argument focuses upon coercion related to leaving a country, neglecting that those who stay may be coerced in ways not tied to leaving the country. If coercion is presumed to be wrong because it violates autonomy and personal respect, then one must examine all of the ways in which people are coerced by states related to migration before forming a policy regarding migration. Constraining people from associating with those outside of the country by denying admission also coerces those who live in the country and this coercion is on par with the coercion Walzer identifies.

If this is the case, then how hard can borders be? Steiner's claim is that national borders may only be as hard as the softest private (individual) domain. Each person has the right to the control of his or her own private property, doing business or associating with whomever is chosen. Borders for these private domains are set individually and are morally justifiable based upon the concept of self-ownership. In order for the state to not violate these morally justified private border settings, the state's border must be no more

rigid than the weakest of these private domains. If the national border is more rigid than the weakest private domain, then the community members are denied their right to freedom of association. Suppose that A desires to associate with people from countries X, Y and Z, but B desires to only associate with people from countries X and Y. The national border should be controlled in a manner that satisfied the desires of A, the weakest private domain, rather than B which is a stronger, or more restrictive domain. If the borders are controlled in accordance with B's desires, A's rights to associate are being denied because people from country Z are not admitted to A's country. In the cases where national borders are harder than the weakest private border, Steiner maintains that the state is no longer representing the interests of all the members of the community; rather, it is representing the interest of some group within the community that desires the harder borders. These harder borders, however, violate the rights of individuals who wish more open borders and without compensation are unjustifiable. Steiner does not address the problem that by using the weakest private domain he forces people with stronger private domains to be forced in some way to associate with those they do not desire to associate.

The problem with Steiner's argument is, as I noted also with Carens on freedom of movement, it sets up any individual's interest as a trump to state interest or the interest of other groups in the community. In the example above, A's desires will always be the determining factor because they are the least restrictive. In a pluralistic community this will create the situation where the state is hamstrung because it must always implement the least restrictive domain,⁷³ unable to make any but the most trivial of decisions out of

⁷³ The phrase "least restrictive" is perhaps misleading. Steiner's view is that the largest group of rights possible must be honored from the perspective of rights. *Ibid.*, 80.

respect for each individual opinion. If state policies are limited by the lowest level of commitment of any member, then the state cannot, in fact, exist because it is doubtful it will have any authority at all. All that is required is for one person to have some desire that runs counter to all other desires. It is that single desire that must then become policy. Even in the case where one might claim, as in a social contract situation, that the members of the community have surrendered their rights in some particular area, Steiner asks why it would be necessary for the state to have a border control policy. Would not it be acceptable for each member to exercise his or her individual commitment? Theoretically such a circumstance is conceivable but raises significant questions about what the nature of the state is and whether what results from such a scenario could be considered a state. Ultimately, this claim by Steiner is inadequately considered and ignores the considerations of Nozick regarding border crossings discussed above that enable the state to act in advance of actual violations of rights or the case of those unable to defend their own property. Steiner's argument from the freedom of association, included here in anticipation of Wellman's argument for closed borders from the freedom of association considered in the next chapter, is inadequately developed and lacks force within the open borders debate.

Resource Entitlement and Open Borders

In the same article in which Steiner presents his brief argument for open borders based upon freedom of association, he also presents a more robust libertarian argument based upon individual entitlement to resources. Setting the stage for this argument is Steiner's commitment that any argument offered must focus upon the rights of outsiders as well as the rights of insiders.

For the concern of human rights violations that, for classical liberals, constitutes the acid-test of policy permissibility, has thus far figured in our discussion only with reference to the rights of insiders....*But outsiders, too, have human rights*...classical liberal theory can be shown to assign them (other) rights which have a direct bearing on the permissibility of their exclusion by hard borders.⁷⁴

Conceivably, insider's rights might never be violated by hard borders. The rights of outsiders, however, may always be violated by hard borders and it is this violation that receives inadequate attention in the liberal argument for closed borders. Classical liberal commitments to the equality and rights of every individual, however, obligate us to give equal consideration to both insiders and outsiders. When equal consideration is given to outsiders and insiders, then a different kind of argument must obtain in order to support hard borders. Steiner argues for open borders and then proposes how it is that borders might become closed.

I will recount Steiner's argument in a different form than Steiner himself offers it. I do this to offer a clearer view of what feature in the world obligates states to a policy of open borders because it is this feature that is disputable and exposes the weakness of the argument. Steiner's construction of the argument first claims outsiders and insiders will view private property conventions differently. Steiner then offers an argument that relies upon the notion of shared ownership of all world resources to demonstrate that hard borders can be implemented only if outsiders are compensated for the loss of their share of ownership in the world. In my reconstruction I will present the argument of ownership first, and then consider the argument of insiders and outsiders. In this manner it will be more evident how Steiner reaches the conclusion of open borders. The issue of compensation is then plainly seen as rectification of a rights violation.

⁷⁴ Ibid., 82. Emphasis is Steiner's.

Steiner argues that in the state of nature all property is jointly owned by all people who thereby, hold a share of the resources. In propositional format, the argument is as follows:

1. Property appropriation rules and national borders are derivative of individual rights.
2. Locke's appropriation rule utilizes labor (indicative of self-ownership) mixed with land, constrained by the Lockean proviso of "enough and as good as" to justify the private appropriation of unowned land.
3. The Lockean proviso entails that each person holds an entitlement to an equivalent portion of land. (1, 2)
4. This entitlement provides ownership in all land prior to appropriation. (2, 3)
5. Kant's appropriation rule utilizes human autonomy, the *a priori* concept of an ahistorical community of land and the general will of humanity to justify private property appropriations.⁷⁵
6. All persons are shareholders in the land prior to private appropriation. (5)
7. Therefore, all unowned property prior to private appropriation is owned by all individuals. (4, 6)

The end result of this argument is that each and every person holds an undifferentiated and equal share in all of the natural resources of the earth. In Locke's argument this share is evident in the proviso. Steiner interprets the proviso's commitment that everyone should have "enough and as good" as recognition that each holds ownership and does not surrender this ownership without granting permission or receiving appropriate

⁷⁵ For Steiner's argument for this premise, see Hillel Steiner, "Kant, Property and the General Will," in *The Enlightenment and Modernity*, edited by Norman Geras and Robert Wokler, (London: Macmillan, 2000).

compensation. Ownership also means the ability to use the land productively or to receive an appropriate share of the proceeds from that land. Kant's commitment is to an abstract conceptualization of the community outside of history in which land is unowned but becomes owned as the result of an agreement of the general will. Steiner's strong claim is that each of these demonstrates the classical commitment to the idea of world-ownership.

Building on this view of world ownership, Steiner's argument for open borders is as follows.

1. All individuals hold ownership in land prior to private appropriation.
2. The concept of border violations requires exclusive entitlement to a piece of property (private property).
3. Such exclusive entitlements require the existence of rules of appropriation.
4. These rules of appropriation are conventional.⁷⁶
5. To be conventional means that these rules are either nonrational or nonuniversal.
6. If the rules are conventional they are only binding upon those for which they are the convention (insiders). (4, 5)
7. Outsiders have no reason to respect conventions not their own.
8. Therefore, outsiders are justified to venture onto, without moral objection, property that others view as private, because they are owners of that property. (1, 2, 3, 6)
9. Denial of property to a person entitled to that property is unjust.
10. Hard borders deny property to individuals who own that property.

⁷⁶ By convention Steiner means by agreement. Any set of conventions could then be different by a different agreement. In support of this understanding Steiner appeals to Lomansky, "Toward a Liberal Theory."

11. Therefore, hard borders are unjust. (8, 9, 10)

In a standard libertarian approach to property, when a person is unjustly denied access to something to which rights are held rectification must occur. One common form of rectification is compensation. Recognizing this, Steiner develops a global fund by which people that have unjustly been denied their rightful access to property can be compensated.⁷⁷ In this manner, states might justify borders, but only if appropriate compensation is made available to those denied access to their property. Steiner believes such a fund might serve to reduce global inequalities significantly. I believe that this fund is deeply flawed conceptually and instrumentally and would fail to achieve any of the ends which Steiner believes it will. However, critiquing this fund lies outside the scope of my primary concerns and I will not consider it further. Let me return now to problems in the main argument.

The idea of world ownership as justified by Steiner is difficult to accept. It relies upon two different arguments that point in this direction, but as with all such inductive arguments it is possible to undermine the conclusion by either presenting a form of liberal argument that does not lead to world ownership or to demonstrate that the argument offered in support of a liberal claim regarding world ownership is not the correct one. I will do both of these.

The most obvious liberal approach to utilize here for the purposes of denying world ownership is that of Nozick. Nozick's entitlement theory consists of three

⁷⁷ This fund should be distinguished from the idea contained in Pogge's global resources dividend (GRD). The benefits of the GRD are intended to benefit the poor by reducing the effects of global poverty. Individuals on Pogge's account might not ever see the dividend directly, but only in its effects. In Steiner's account each individual would receive direct compensation for the denial of the right to exercise property rights. See Thomas Pogge, "A Global Resources Dividend," in *The Ethics of Consumption: The Good Life, Justice and Global Stewardship*, edited by David A. Crocker and Toby Linden (Lanham, MD: Rowman and Littlefield, 1998).

components: justice in acquisition, justice in transfer and rectification of injustice in holdings.⁷⁸ People come to hold unheld things, and once those rights have been established they are entitled to hold or transfer that property in accordance with their own desires. It is only by these two means that people come to hold things. Possession that does not occur in accordance with the principles of acquisition and transfer is unjust. The principles of rectification of injustice in holdings are then invoked to return possession or provide compensation to its proper owner. Although Nozick left most of entitlement theory unspecified, he did not leave unspecified the status of property prior to acquisition. Things prior to being held are unheld⁷⁹ and one may justifiably come to own things to the exclusion of others. The inclusion of a Lockean proviso does not undermine a system of private property but only constrains certain kinds of actions. It is not the initial acquisition that is unjust using Locke's proviso, but the initial acquisition and all of the subsequent transfers that must violate the proviso. Nozick maintains that in a free market system the proviso is unlikely to be violated except in the case of catastrophe.⁸⁰

It is possible to claim that Nozick sidesteps the issue of ownership through his use of the term "holdings." But in context and given the strong rights people have to their holdings, there can be little doubt what Nozick has in mind is ownership. Arguments about holdings are arguments about ownership. My argument against Steiner's claim of shared ownership has two points. The first is that when Nozick discusses distribution he makes the claim that there is no central distributing agent.

⁷⁸ Nozick, *Anarchy, State and Utopia*, 150-153.

⁷⁹ It should be noted that Nozick provides no argument for this position.

⁸⁰ See the discussion in *Ibid.*, 174-182. Nozick writes, "the question of the Lockean proviso being violated arises only in the case of catastrophe." The historical nature of entitlement theory raises the significant question of how to determine the baseline in order to ascertain that someone is left worse off by a particular acquisition. There is not an easy answer to this question but it is likely that most acquisitions will not leave people worse off, and when they are, financial compensation can be offered to ameliorate their condition.

There is no central distribution, no person or group entitled to control all the resources, jointly deciding how they are to be doled out. What each person gets, he gets from others...There is no more a distributing or distribution of shares than there is a distributing of mates in a society in which persons choose whom they shall marry.⁸¹

This passage implies that things prior to specific holdings are unheld rather than held by anyone or by all.⁸² If they were held by all there would be some person or person with control to portion out the property and subsequent transactions would be subject to the principles of justice in transfer rather than those of acquisition. This is not what happens. Rather, people come to hold unheld things in accordance with the principles of justice in acquisition. Nozick identifies for us what questions justice in acquisition must answer but chooses not to answer them for us.⁸³ Justice in acquisition needs to identify the kinds of things that can be held and it could be that property is not one of these things. But in building upon the Lockean proviso, which is plainly about property, it is reasonable to conclude that Nozick would include land as something that can be owned. When Nozick begins his consideration of the problems the proviso causes for justice in acquisition his examples include land as the kinds of things that can be owned. As Nozick points out in his discussion, there are different ways to interpret the proviso and what it means to leave “enough and as good.” It is this possibility to interpret the proviso differently than Steiner that provides my next critique.

The second strategy for undermining the argument is to demonstrate that Steiner’s claim of world ownership attributed to either Locke or Kant is not correct. I believe that

⁸¹ Ibid., 149-150.

⁸² It does not matter here whether the perspective is natural society (state of nature) or organized society. People have rights in either case. In natural society one protects one own rights to property, in organized society property rights are protected by the state. In either case, one can come to hold unheld things.

⁸³ For one attempt at this, see my unpublished paper “Rehabilitating Entitlement Theory: Justice in Acquisition,” a portion of which was presented at the Southern California Philosophy Conference, 2005.

there is an alternative and better conclusion to draw regarding the Lockean proviso than the ownership approach that Steiner uses. Recall that Steiner interprets the phrase “enough and as good as” to entail that each individual has an entitlement to all property in the world. This entitlement means the right to use the property productively in some way, either directly or by the resources the property contains. This entailment, however, only seems appropriate if ownership is the focus of Locke’s concern in this section of the *Second Treatise*. But ownership is not the important focus of this section of the treatise.

Locke, at the beginning of Chapter V, acknowledges that it is possible to argue that since God gave dominion over the land to Adam that subsequent ownership of the land is either common or belongs to a single sovereign. Locke denies this is the case and proceeds “to show how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners.”⁸⁴ Locke intends to show how starting from a point of common ownership of natural resources the world may become carved up into pieces owned by individuals without express permission or compensation paid to others. This is precisely the kind of process that Steiner denies is possible. The focus of Locke’s argument is upon the right of people to provide for their own preservation (“support and comfort of their being”⁸⁵), which is known by natural reason. Without holding property, a person cannot use it for support: “there must of necessity be a means to appropriate to them some way or other before they can be of any use, or at all beneficial to any particular man.”⁸⁶ The pathway of appropriation for Locke was the mixing of labor with whatever is removed from the state of nature. This appropriation may continue as long as others may also appropriate.

⁸⁴ Locke, *Two Treatises*, 111.

⁸⁵ Ibid.

⁸⁶ Ibid.

But the important emphasis here is not upon ownership that results in equal shares of property, but upon the ability of individuals to provide for themselves. Locke, in the example of picking up acorns, argues that we appropriate without the consent of all in this and it would be foolish to think this appropriation is disallowed unless the approval of all is required. If this approval was required, people would starve despite the plenty that is available.

The other concern in allowing appropriation is that some might appropriate too much, leading to waste. But this is plainly disallowed on Locke's account. People may only acquire that which can be used without spoilage. These laws of nature that apply to the goods of the earth apply to the earth itself: "But the chief matter of property being now not the fruits of the earth...but the earth itself...that property in that too is acquired as the former."⁸⁷ Appropriation of land is constrained by the same proviso as these goods and will limit the accumulation of large sections of land by a single person. So long as others may procure and support themselves, appropriation is acceptable. Locke believed that there was so much land that there would always be adequate land for others and as long as there was, people could not complain about the appropriation of property constrained by the spoilage problem.⁸⁸ The subsequent creation of money eventually enabled people to bypass the problem of spoilage and thereby accumulate more than could be individually used. But Locke's focus is on the ability of persons to support themselves from the land, not on ownership in common. Locke's argument, while holding to original ownership in common as well as the possibility of ongoing ownership

⁸⁷ Ibid., 113.

⁸⁸ It is uncertain how Locke might respond to the fact that there are no longer these commonly owned tracts of land outside of countries (e.g., America at the time of Locke). I think he would argue that the use of money has enabled people to continue to support themselves and that the proviso would apply to constraining exchanges of labor and possibly what we know today as welfare support.

in common, nonetheless supports private acquisition as necessary for individual provision. This process of acquisition became institutionalized by local communities which then reached agreements with other communities recognizing their distinct boundaries. By this process people gave up the right to property that is held commonly in other communities: “expressly or tacitly disowning all claim and right to the land in the others’ possession, have, by common consent, given up their pretences to their natural common right.”⁸⁹ By this process that which was once held in common has now become private without requiring compensation.

In returning to Steiner’s argument we see that he cannot appeal to Locke to support common ownership. Locke explicitly argues that people may appropriately acquire land for their support without consent or compensation to others. This process establishes borders on the individual property. The purpose of political society is to protect those rights among those who form the political community. The government Locke envisions extends coincident with the rights of the individuals governed by that government, which implicitly establishes borders, borders which are justifiable even to those outside the community. Hence, Steiner’s argument has been weakened and does not strongly support the claim of open borders.

Conclusion

What I have sought to show in this chapter is that although there are a number of different arguments for open borders based upon the commitments of liberal political philosophy, none of them are conclusive in the manner that their proponent intends. Each of the arguments is incomplete or substantially weaker than believed. Carens’ inductive

⁸⁹ Ibid., 119.

argument is not as strong as he believes. Although it may, under some circumstances give rise to wide-open borders, it is equally likely to result in an argument for (partially) closed borders. In other words, the commitments of liberal political philosophy Carens considers seem not to lead to uncontrolled borders but to controlled borders, although those controls might have different justifications and implementations than those that are routinely offered. This critique is stronger than the one offered by Meilaender as it undermines the particulars of the argument, rather than claiming the argument needs to justify its commitment to liberalism or its particular form of liberalism. Whatever argument we make regarding borders faces the problems that Meilaender identifies. This problem also exists for any argument extending from liberal principles. Why should nonliberals accept any argument made by liberalism? This is a broad question, one Carens need not answer here, particularly in light of the fact that the arguments he has made cannot make the claim liberalism requires a commitment to open borders. Carens arguments regarding the freedom of movement has also been shown to be inadequate because it fails to specify the principle, and when this principle is specified it is one that includes constraints of a type common in liberal political philosophy and therefore, should not be troubling. Arguments based upon other principles, such as freedom of association and world ownership have also been undermined, at least in the forms in which they are currently offered. The position we are left with, unfortunately for those arguing for open borders, is that there is not, at the present time, a conclusive argument that the commitments of liberal political philosophy require a concomitant commitment to open borders. In order to hold to that position new arguments that can eliminate the problems I have identified, need to be constructed.

CHAPTER 3

LIBERALISM AND CLOSED BORDERS

The liberal argument for open borders emphasizes the priority of the individual over political systems. The individual is prior to the state, and the rights and interests of the individual have priority over the rights and interests of the state. The state is created by individuals to serve individual purposes and is always, or nearly always, constrained by individual interest. From this perspective, each and every individual becomes a constraining factor on state action.¹ This is, however, not the only manner in which to consider the relationship between individual and state within liberalism. The state can be prior to the individual in a manner in which the possible interests of the individual are shaped and given meaning because the individual lives within an existing community. Individuals are not born isolated in an empty world. Rather, each person is born into a community that necessarily shapes the individual in powerful ways. If the state is prior to, but not necessarily more important than, the individual, the question of open borders is commonly answered with the claim that border controls are established at the discretion of the individual state. The resulting degree of openness, with some exceptions, is always determined by the state.

The liberal argument that borders may be closed at the discretion of the community takes three different forms. The first, and initial expression, is the classic

¹ See Mailaender's assessment of Carens as regards this point discussed in Chapter 2. See also Steiner's critique of Walzer, also discussed in Chapter 2.

membership argument of Michael Walzer in *Spheres of Justice*. Walzer argues that citizenship is like membership in various institutions, and just as membership may be managed by the existing members, so countries can control who is eligible to participate in the state and thus, in the distribution of the social goods in that state. The second form, and closely associated with the first, is the national identity and culture arguments of David Miller, among others. Miller argues that citizens of countries have national identities which they rightfully care about and desire to maintain. Often the people who share these identities aspire to self-determination, to be independent and govern themselves. Immigration changes these identities and poses problems to achieving self-determination and therefore, is subject to control as the existing community seeks to control the rate and type of changes that occurs to their identity. The final form, which in approach looks more like the single principle arguments for open borders, takes a principle that is of central concern to liberal political philosophy and argues that this principle justifies the possibility of closed borders. A prime example of this argument is found in the recent work of Christopher Wellman. Wellman argues that liberal individuals have the right of freedom of association, including the right of disassociation. This right justifies our ability to decide with whom we associate. Open borders undermine this right because others can force existing citizens to associate with the immigrant. In order to honor the right to the freedom of association, liberal communities must allow that borders can be closed in order to prevent this forced association.

This chapter will present and analyze these arguments and review some of the common critiques. I will also present a new critique of both Walzer and Wellman. As with the arguments for open borders, I will demonstrate that these arguments are not fully

satisfactory even though they contribute in meaningful ways to the debate. I will examine each of the arguments in the order in which they were mentioned above.

The Membership Argument

Membership and Walzer's Theory of Goods

The membership argument of Michael Walzer is found in Chapter 2 of his *Spheres of Justice*. Walzer uses the relationship between individuals and clubs, neighborhoods and families as analogies for our relationship to the state as political community. Although, as Philip Cole has noted in his *Philosophies of Exclusion*, each of these arguments raises questions, it must be remembered that this is an argument of analogy, and that permits some aspects of belonging to clubs, neighborhoods or families to not be relevant. It is also important to understand that the membership argument as made by Walzer rests upon his understanding of human nature, the role of community, and the distribution of social goods which leads to his notion of complex equality. This understanding is “imminent and phenomenological,”² mapping onto particular people at particular times rather than presenting some ideal plan applicable to anyone, anywhere, at any time. Walzer is concerned with justice in the world in which people live rather than in an artificially constructed world. Given the nature of Walzer's argument, if we are to understand the membership argument, it is with Chapter 1 of *Spheres of Justice* that we must begin.

The concern of *Spheres of Justice* is the problem of distributive justice. Following on the heels of the vigorous discussion regarding this topic initiated by the divergent views of Rawls and Nozick, Walzer considers the question how should social

² Walzer, *Spheres of Justice*, 26.

goods be distributed within a community. Any possibility of answering this question requires a theory of goods; that is, we must identify the nature of that which is being distributed as well as the nature of who is doing the distributing. It is the failure to answer these questions or to answer them incorrectly that Walzer believes leads many astray. The common answer is that individuals are born into a world unconnected to others or things. The same is held of various goods: they too appear in a world unconnected to other goods. Not only are these two answers wrong, but they lead to another problem: the neglect of nonmaterial social goods that are distributed just as surely as material goods and with just as great an impact upon individual well-being. What is needed, therefore, is a different theory of goods.

The standard theory of goods, on Walzer's account, is this: "People distribute goods to (other) people."³ This approach to goods emphasizes two characteristics. People are seen only through the process of giving and taking goods from one another, as participants in a transaction of limited scope. Further, these goods are items to exchange on whatever basis people choose. Missing from this picture is that people produce and consume the goods that are subject to exchange. There are reasons why a community chooses to create some goods rather than others and why people in that community desire to possess one good rather than another. These reasons are tied to the meanings and values that are placed upon various goods by the community in which we are situated. Although it is possible that these meanings might be available in other communities as well, it is because they are part of the community in which the individual is situated that the individual desires those goods. Although we choose to produce or consume particular goods, that these goods are ones which we can choose has its foundation in the

³ Ibid., 6.

community valuing of these goods. Communities define, in a complex and historical process, what goods are deemed valuable. Individuals who focus upon different goods find their relation to the community around them both stressed and constrained in various ways. Recognizing these features of our actual situation leads Walzer to propose a different theory of goods: “People conceive and create goods, which they then distribute among themselves.”⁴ The focus has shifted from the pattern of distribution (Rawls) and the process of exchange (Nozick) to the process by which goods receive their meaning and become of value to people. This process is necessarily communal:

Goods don’t just appear in the hands of distributive agents who do with them as they like or give them out in accordance with some general principle. Rather, goods with their meanings – because of their meanings – are the crucial medium of social relations; they come into people’s minds before they come into their hands; distributions are patterned in accordance with shared conceptions of what the goods are and what they are for.⁵

The important feature of this theory of goods is the recognition that all goods have social meanings that have been developed within a group of people. It is these social meanings that determine distribution, not abstract principles such as equality (Rawls) or the strict adherence to a specified process (Nozick). These goods, and people’s possession of them, express social relationships. The exchange of goods between people is not arbitrary but is bound to the meanings that society has given to those goods. It is not possible for people to be free of these meanings and to have relationships without them; people are necessarily bound to those social meanings. Even the rejection of a socially meaningful good is tied to those meanings and will affect social relationships.⁶ If we

⁴ Ibid., 6.

⁵ Ibid., 6-7.

⁶ This assumes that the rejection is rational and understood by the person rejecting the good. It is not obvious that this would always be the case. Why some individuals reject social goods is open to debate.

understand goods in this manner, that is, that goods should be distributed in accordance with their meaning, the result is what Walzer calls “complex equality” rather than the more common “simple equality.”

Walzer’s account of justice as a system of complex equality requires that different principles of distribution be utilized within the sphere of each of the various social goods produced by society. Some goods might be distributed on the basis of a principle of equality (opportunity) whereas other goods might be distributed on the basis of need (medical care) or desert (public recognition). It is not unjust for a member of society to possess large amounts of any one kind of good. It is only unjust when a member of society is able to turn the possession of one kind of good into another kind of good that requires a different standard of distribution. The different kinds of social goods must be stovepiped, so to speak, and the possession of one good should not inappropriately influence the distribution of other goods. For example, the ability to turn money into political power is unjust. Given the influence of money in political contests, individuals with great wealth can unduly influence the outcome of elections. Constraining the use of personal wealth in elections in favor of government financed elections is one way of preventing the inappropriate influence of money on political power. In those cases where one good enables a person to obtain more of other goods, the first good is said to be dominant. When a person possesses large amounts of one good it is possible to speak of monopoly. In Walzer’s words: “Dominance describes a way of using social goods that isn’t limited by their intrinsic meanings or that shapes those meanings in its own image. Monopoly describes a way of owning or controlling social goods in order to exploit their

Some possibilities are that the person is a member of competing communities with conflicting values or that the community offers equivalent goods, or at least multiple goods, that serve the same purpose. Walzer does not, to my knowledge, consider this possibility.

dominance.”⁷ Dominance and monopoly lead to social conflict as exemplified in the current “Occupy Wall Street” movement.

Three kinds of social conflict arise from this understanding of monopoly and dominance. The first case is when members of society claim that some dominant good, whatever it is, needs to be more equally distributed. This is the case of the unjust monopoly: a small number of people hold too large a share of the good. A second case arises when people claim that there should be no constraints on the distribution of goods – all goods should be distributed autonomously. This is the case of unjust dominance: no good should give a person control over other goods. The final case argues that some new good should replace the dominant good. This argument claims simply that the existing patterns of dominance and monopoly are unjust and should be replaced with a new structure, dominated by some new good monopolized by some new group. This last category doesn’t necessarily lead to patterns of justice for the new pattern may be as unjust as the previous pattern, but in different ways. Walzer’s concern in achieving complex equality is with the second case, the problem of unjust dominance. By creating different distributive schemes for different goods any particular good is prevented from becoming dominant.

Walzer’s theory of goods raises questions about the nature of the group that creates, maintains and changes these social meanings. The claim that all goods are social goods implies the existence of a society. The standard theory of goods that underlies distributive justice leads most philosophers to neglect an important question: How is this society constituted? The common assumption is that it is already established and fixed. But this is not the case. Membership in the group is just as surely a social good

⁷ Ibid., 11.

distributed by society as are material goods. Who has and who does not have this membership must be explored. Walzer's claim is that the correct boundary to focus upon in considering membership is the political boundary. Political communities are, in Walzer's words, "the closest we can come to a world of common meanings." Deviating from the political community as the boundaries for the distribution of social goods, either because the goods should be distributed to smaller groups within the political community or to larger groups of which the political community is only part, are themselves political decisions made by the existing political community. Further, when the distribution of social goods is subject to claims of justice it is the political community that enforces such justice claims. Once it is recognized that the creation of social goods requires bounded communities, the question of membership, who is in and who is out, naturally arises. It is in exploring this question that Walzer turns to the issue of membership and the three analogies.

Walzer begins his exploration of the nature of political communities by claiming that most people have no direct experience of what it is to be a member of a country, or of the very nature of a country. The use of analogies is an attempt to compensate for this lack of experience by appealing to those things of which we do have experience: neighborhoods, clubs, and families. Each of these analogies contributes a unique perspective on the nature of political communities and the problem of admission and exclusion. It is important to emphasize that boundaries are an essential part of political communities prior to Walzer undertaking the membership argument. The membership argument isn't used to justify admission and exclusion but to understand how it operates. Admission and exclusion are justified by the essential nature of boundaries to political

communities. Political communities exist prior to the question of membership as schemes of cooperation. These cooperative arrangements are established among people who already have regular contact with one another. The question of membership applies to those existing outside these cooperative arrangements. When faced with contact with these individuals how should we respond? Boundaries are not created by answering the question of membership; boundaries already necessarily exist. Their justification is that they are essential to cooperative arrangements. What we must do is understand how they operate.⁸

Neighborhoods are informal associations, existing without rules and conditions regarding who can live in them.⁹ Individuals choose a neighborhood on the basis of its fit to their desires – it is close to work, it has good schools, it is close to the beach. When people move into a neighborhood no one asks for their membership card. They just move in and find they either are welcomed or not welcomed. In the latter case, the new neighborhood will undoubtedly fail to meet their expectations. All of this seems rather obvious and uncontentious. But Walzer's claim is that neighborhoods can only work this way because there is some larger unit encompassing the individual neighborhoods which is closed. This closure provides some bounding of society that enables neighborhoods to be open. This provides (reasonable) assurance that those who enter the neighborhood share the relevant understanding of social goods, although in the case of neighborhoods as indifferent associations this shared understanding is not very deep. Without this larger boundary, the smaller units would be at risk and would seek to create their own strong boundaries in order to protect the social goods they distribute. As Walzer puts it, "Only

⁸ Ibid., 31-33.

⁹ Ibid., 36-41.

if the state makes a selection among would-be members and guarantees the loyalty, security and welfare of the individuals it selects, can local communities take shape as ‘indifferent’ associations, determined solely by personal preference and market capacity.”¹⁰ Human nature, the need for loyalty and security and the obligations of welfare, can only exist if they are limited. Humans cannot live in completely unbounded communities where anybody is able to become part of the local community, and therefore, the right to enter communities is constrained at some level.

The right to constrain entry, however, does not lead to the right to constrain exit. Communities exist on the basis of commitment. Those already here are already part of the community and expected to participate in that commitment in the same way that those who might be admitted are expected to be committed to the community. When some individual wishes to be free of that commitment, he or she must either be coerced into participation or permitted to exit. Coercion necessarily violates the scheme of complex equality Walzer envisions by compromising individual autonomy and is not permitted. Although society chooses the social goods and their meanings, individuals then utilize those goods. When those social goods no longer hold meaning for the individual, the individual must be allowed to leave when they choose because there is an irreparable break between the individual and the community. This is demonstrated in the understanding we have of clubs. Members of clubs make a commitment to one another in relation to the purposes of the club. Existing members make decisions about who can join, but do not constrain those who wish to leave (provided they do not have binding contractual commitments that must be met first). Such constraint undermines the very nature and purpose of the club by forcing participation and increasing the likelihood of

¹⁰ Ibid., 38-39.

destructive factions developing. Clubs, therefore, are like states, albeit with a limited range of social goods to be distributed and fewer powers to enforce those distributions. What we all understand about clubs is that those outside have no right to be inside unless permitted by those already inside.

When clubs select new members, they do so for various reasons. The person applying is desirable and will contribute much to the activities of the club. Any club which uses this as the sole criterion for membership selection will not be morally troubling. But when we look at the state, with the wider range of social goods that are distributed, such policies are troubling because of the profound effect upon people's lives by being denied access to these goods. There are certain social goods, such as kinship, that pull us to admit people as members simply because of their relation to someone who is already a member, regardless of what that person brings to the state. In this sense states are like families. When we choose to be related to one person (such as through marriage), we also become related to others, sometime nameless others, without our choosing. These unchosen relationships arise because of the manner in which we conceive family relationships and thereby create moral obligations that have not been specifically chosen. In this manner, the family to which we are obligated is larger than just the person we choose. Similarly, the obligations we have as members of our political community are extended to others outside our community with relationship to members of our community. Sometimes these obligations are extended to those outside the community based upon kinship, as is often seen in states built through immigration, and on other occasions it is based upon nationality, where a state with a homogeneous nationality serves as a refuge for those of shared nationality outside the state. The

emphasis for Walzer's argument is not that states have obligations based upon kinship, but that states recognize that in some cases their obligation of membership extends beyond the community.

The result of the use of these analogies is that we should now have a better grasp of what it is to be a member of a country, a political community. The neighborhood analogy demonstrates the role of borders, the club analogy demonstrates the manner in which states are closed while the family analogy demonstrates the manner in which states are open. Communities must be closed at some level to function in a manner compatible with human nature. Those who are already within the boundaries of closure have a role in the creation of social goods and their meanings. Those who are already members already participate in the exchange of these goods. But those who are outside, desirous of sharing in those goods, must be admitted by the members of the country before they participate in the goods. Without this decision process, communities will be unstable, the meanings of social goods changes or are lost, and even the possibility of creating these kinds of meanings will be undermined. States must have boundaries, creating members and nonmembers. The state then controls the admission of new members, admitting some and rejecting others.

The state, envisioned in this manner, cannot be otherwise according to Walzer. It isn't that there aren't other models; it is just that those models have not and cannot, at least at this time, exist. One alternative to discrete communities with unique social goods and meaning is a global community. While this is certainly a possibility, if communities are determined by the social goods and meanings that are shared, the global community does not yet exist. Justice cannot be realized in an entity that doesn't exist. Another

alternative is a world without these kinds of social meanings, in which every individual is in some sense isolated from all others. In the absence of community, justice amounts to the hoped for good behavior of others and there is nothing to be said about it. The pursuit of justice, therefore, requires that we understand the nature of countries and the rights that attain to them because the state is the arbiter of justice.

Cole's Critique of Walzer

The most significant direct critique of Walzer's membership argument is found in Philip Cole's *Philosophies of Exclusion*. Cole's broad concern in this work is the legitimacy of attaching significance to borders from the perspective of liberal political philosophy. The descriptive claim that people do attach significance to borders is not debatable. However, Cole finds this practice indefensible and is troubled that this commonplace practice of ordinary people also finds itself entrenched in liberal political theory. Cole writes, "most of the work in political philosophy that does address the question of membership boundaries...treads an uneasy path between the assertion that people just do attach significance to (national) boundaries, and the assertion that they ought to."¹¹ Political philosophy, and particularly liberal political philosophy, is a normative task. The justification of borders and its most significant manifestation in membership, both in practice and conceptually, cannot be assumed. It must be demonstrated. The question for Cole then is whether the modern state, built upon a liberal political philosophy, can justify excluding people from membership. His conclusion is that the modern state cannot justify excluding people from membership without violating liberal principles:

¹¹ Cole, *Philosophies of Exclusion*, x.

With its universalist commitment to the moral equality of humanity, liberal theory cannot coherently justify these practices of exclusion, which constitute “outsiders” on grounds any recognizable liberal theory would condemn as arbitrary. And yet at the same time the liberal project depends upon these practices: the existence of a liberal polity made up of free and equal citizens rests upon the existence of outsiders who are refused a share of the goods of the liberal community.¹²

The situation then, is one of contradiction between liberalism’s “universalism and its concealed particularism.”¹³ Resolving this contradiction requires opening borders and memberships to all comers if liberal political communities are to be true to their commitment to the equal moral worth of all people. As part of this larger argument Cole analyzes the structure of each of Walzer’s analogies and argues that not only is the analogy incorrect, but the structure of Walzer’s argument in each case is incorrect. However, before undertaking this task Cole addresses a general issue of membership in states that Walzer assumes: that it is existing members who determine the rules of membership.

Discussions regarding membership often begin by discussing the nature of membership rules, specifically issues regarding their application. A common argument is that members should not apply rules to others that did not apply to their own membership. If this is the case, then membership rules should be static and never change and if one became a member through random or arbitrary procedures or conditions then there should be no membership rules at all. Cole believes this is easily rebutted on two fronts. The first is that we can distinguish between formative members, those who create the organization, and subsequent members, those who join after the organization has been created. The two circumstances are so radically different that it is reasonable for

¹² Ibid., 2.

¹³ Ibid.

different rules to apply. However, when we examine the modern state it can be claimed that everyone is a subsequent member, and therefore, should only apply to others membership criteria applied to themselves. On another view, however, it can be argued that all members are formative members because the state is in a constant state of creation; every action undertaken by the current members is creating the state. Hence, the rules that applied to them might not make sense, particularly if it becomes understood that the rules previously utilized were immoral. If one becomes a member based upon skin color, then members should have the possibility of changing the rules of membership to be more inclusive. This reasoning demonstrates that Walzer is correct that existing members should determine the rules and that they should not be constrained to use the rules applied to their own membership. However, the lack of this constraint does not mean there are no constraints of any kind. Cole will eventually argue that the commitments of liberal political philosophy provide significant constraints. After defending Walzer's purpose in considering membership, Cole turns directly to the analogies in the reverse order that Walzer presents them.

Cole begins by noting that families vary in their nature, based upon a variety of connections, including genetic, legal and conventional. Families are usually a mixture of all three types of connections. Families are not always chosen and when chosen they often include members not specifically chosen. Further, these connections often do not rise to the level of relationships at all; they are simply connections with no practical force (e.g., relatives who have never met). This mixed nature of families means that when an appeal to families is made we must pay attention to which aspect of the family, connection or relationship is appealed to. When we pay attention to which aspect of

families is being used, families as an analogue for the state will no longer be useful: “Once we take into account the degree to which families *are* chosen and constructed, it is no longer a useful analogy.”¹⁴ Cole is claiming that the important aspects of family are those which are chosen and constructed through voluntary means. Families as connections can be considered a natural entity whereas families as relationships are constructed. Once the focus of concern becomes relationships, we have issues of ethical significance subject to our concerns as liberals. Concluding that the state is a natural entity can lead to significant moral issues associated with extreme forms of nationalism to which liberal political philosophy objects. If the state is a constructed entity of relationships we must understand the moral foundation of those relationships. In this latter case, which Cole claims is the proper case,¹⁵ Walzer’s argument will not hold up to liberal scrutiny because our choices will be based upon arbitrary factors (to whom we are related naturally by birth) from the liberal viewpoint.

Cole further argues that there is a disconnect between the argument that Walzer appears to make and the argument that he actually makes. Cole reconstructs Walzer’s apparent argument like this:

1. Political communities are like families.
2. Families involve ethical relationships with others that are not chosen.
3. Therefore, political communities have ethical relationships with others that are not chosen.

¹⁴ Ibid., 68.

¹⁵ Ibid., 68.

In this case, the conclusion only follows from the premises if political communities are like families in all respects.¹⁶ This is simply not the case (Cole admits Walzer would agree) and therefore, the argument cannot work as it is offered. Cole offers the following reconstruction of the actual argument:

1. Families involve ethical relationships with others that are not chosen.
2. Political communities involve ethical relationships with ‘outsiders’ that are not chosen.
3. Therefore, families and political communities are alike in this respect.

This is not, Cole claims, an argument at all, but a description. As a description it has no normative force and “it is obvious now that we cannot *deduce* anything about the nature of political communities from the nature of families.”¹⁷ The difficulty of this argument is made plain by the problem of refugees. Walzer’s approach justifies choosing between needy people based upon our existing connections to them. If faced with two groups of refugees, Walzer’s account permits deciding whom to help based upon our natural connections with them,¹⁸ if we must choose because we cannot help all. A needy group to whom we have no connections may be neglected in favor of those to whom we do have connections.¹⁹ These kind of natural connections are rejected by liberal philosophy as arbitrary and incapable of serving as moral justifications. If those choices cannot be justified for refugees they also cannot be justified in less demanding circumstances.

¹⁶ One might also object that premise 2 is incorrect. Cole does not consider this objection.

¹⁷ Ibid., 68.

¹⁸ Cole assesses the argument with the sense of connection. Walzer actually uses the word affinity which can be either natural (ethnic or kinship) or ideological. The sense that is important for Walzer is that we recognize ourselves in this other group and are thereby connected to them.

¹⁹ Walzer, *Spheres of Justice*, 50-51.

The club membership model is the most significant for Walzer and Cole aims to undermine it in several ways. The first avenue of attack is to claim that Walzer uses a simplistic understanding of clubs in that Walzer assumes that clubs always decide freely upon their members. In practice this is just not the case. The membership policies of clubs are often subject to both legal and moral review, with objectionable policies being cast to the side, or, members who belong to clubs with objectionable policies receiving public scorn. Cole proposes understanding membership differently. A moral understanding of club membership will result in policies in which the only ground for rejecting a membership application is that the admission of this prospective member prevents achieving the goals of the club. This applies to both the corporate goals of the club and the individual goals served by that individual's membership in the club. Clubs will only be permitted to refuse membership if the admission of any individual prevents the accomplishment of either of these goals. Clubs will also only be permitted to deny membership based upon the number of members if there is some number of members beyond which the goals cannot be achieved. This approach to club membership places significant limitations on the ability of clubs to deny membership. If this is the correct model for club membership, it will apply only to states if states have specific purposes and the citizens of those states have legitimate individual purposes. This places an obligation upon the proponent of closed borders to identify the specific purposes of the state, the legitimate individual purposes of its members and show that any particular admission undermines those purposes. Cole claims that these requirements will result in almost no denial of admission for it is difficult to envision when any particular admission

will undermine either the purpose of the state or the legitimate individual purposes of its members.²⁰

A second avenue of attack for Cole is Walzer's claim that a self-conception of a political community is essential to its survival and therefore, political communities have the right to protect it. Cole does not dispute that political communities have such a self-conception. His disagreement is with the claim that political communities have the right to control and protect this conception from outside forces. Under the model of clubs presented thus far by Cole, such protection can only be justified by Walzer arguing that such a conception is required to fulfill either some purpose of the state or some legitimate individual purpose of its members. This argument is not offered by Walzer and Cole claims that there is no reason we should expect that such an argument is even available.²¹ If a shared self-conception is not required by political communities then there is no more justification for protecting that self-conception by restricting membership. Further, the example of clubs cannot help here as it is not obvious that clubs must have such a shared self-conception to function or that where such a self-conception exists that clubs must protect it to survive. The club analogy breaks down and does not support Walzer's claim in the manner that Walzer needs, much in the same way that the family analogy does not support Walzer's claim for restricted membership.

Finally, Cole turns to the neighborhood model. In reconstructing this argument Cole reaches far beyond the simple uses to which Walzer uses neighborhoods in order to build a more complex argument. Walzer's limited claim is that neighborhoods can only exist as indifferent associations, where people are free to come and go based upon their

²⁰ Cole, *Philosophies of Exclusion*, 71.

²¹ *Ibid.*, 71.

own preferences and the availability of resources within the neighborhood, if states containing the neighborhood are at least partially closed. Cole interprets this as a claim about movement; movement is desirable and the fostering of local movement is best achieved by constraining wide movement. If people do not have confidence in who can move into their neighborhood they will act to create local controls on movement. To the limited claim of Walzer's, Cole adds as a premise in the argument a further claim that the distinctiveness of cultures require similar boundaries of closure as do the protection of liberty, welfare and political systems. Since each of these elements requires some kind of closure the state is entitled to the control of borders.

To demonstrate their illegitimacy Cole recounts the circumstances of a Hasidic community in England celebrating Purim. The celebration expresses their own identity but is open to all who wish to come and enjoy the celebration. Cole's claim is that groups give neighborhoods a distinctive character without border controls. Membership in the group itself is tightly controlled; residence in the neighborhood is not.²² This is in fact, the ideal of city life in which diverse groups maintain their own identities while intermixing with those with different identities. What happens at the local level can also be found at the national level. Just as the Hasidim do not control who comes through their neighborhood at Purim, so states do not need to control who comes through the country. Although neighborhoods and states open in this manner might be considered fragile in their character, closing the neighborhood or state is not necessary for the identity of the neighborhood to exist and those groups contributing to this character are

²² Tamir also points to the manner in which various national groups maintain the culture of their community in the context of open borders, e.g., Quebecois, groups in Belgium, as well as those in diaspora, e.g., Jews and Armenians. Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993), 166.

free to relocate when necessary. As a result, neighborhoods fail as a model for the modern state and its control of borders just as the other analogies have also failed.

Cole's critique of Walzer on membership is forceful and requires careful consideration. I believe, however, that Cole's critique goes wrong on several accounts. The first problem is general and conceptual. Cole claims Walzer uses the analogues as models, which assigns too much importance to each example. Models are things we pattern off of, analogues are things we use to understand. If the family is a model for the state then the state is patterned after the family and should implement the kinds of relationship and functions that the family serves.²³ As an analogue, however, some feature of the family is elucidated in order to understand a similar feature in the state. This is precisely the argument that Walzer makes. Walzer's claim is that it is difficult to understand exactly what it is like to be a member of a state. Walzer identifies some feature of the state and then uses the different analogies to help us understand this feature of the state. The state is the way it is not because it is patterned from these models but because of the theory of goods Walzer relies upon in which communities are cooperative arrangements in which various goods have shared meanings. It is not that political communities need a shared identity to be successful as Cole claims Walzer argues,²⁴ it is that they already have one, without which the community would not exist in the first place. Cole reverses Walzer's argument, making Walzer's premise his conclusion. The inversion of the argument by Cole undermines his critique.

Rejecting Cole on the basis of his use of models rather than analogies does not let Walzer off the hook. Cole could have criticized Walzer on the basis of the problems

²³ Note that the modern welfare state actually does this and is often criticized for performing functions that properly belong only to the family.

²⁴ Cole, *Philosophies of Exclusion*, 67.

associated with arguments from analogy, such as the great distance between the analogue and that which is being understood. This critique might claim that each of the analogues is too far removed, that it is different in too many aspects, from the state to be of use. There are more aspects of the family, club and neighborhood that do not apply to the state than do apply. This might indicate that the analogue is too far removed from the target and should not be applied. Walzer, however, is careful to not appeal to too much in the analogy. He does not claim that the family (or club or neighborhood) is a particular way and therefore states must be that same way, or that because the family and state are alike in one aspect they are alike in other aspects as well. Rather, he starts with the descriptive claim of how states are and uses the family to help understand this. The normative force of the argument derives not from the claim of how families are, but from our understanding that for families (and states) to not be this way undermines the institution in a fatal manner. Families (and states) can be no other way and be functional. Walzer escapes the standard critique of arguments from analogy because his argument does not overreach in its use of the analogy. But what of Cole's critique of particular aspects of the individual analogies?

Cole's argument regarding neighborhoods is shallow and doesn't really reflect the problem of membership. My enjoyment of dancing and food as part of a religious celebration doesn't make me a member of the community, nor does it demonstrate that I share in the social meanings of the celebration. Although I share in the superficial aspects of the celebration I do not share in the substantive meaning of the celebration because I do not share in the meanings attached to the social goods that underlie the celebration. In all likelihood, any attempt of mine to become a member of the

community would be rebuffed. Cole notes that the Hasidim do tightly control membership in their community. Cole claims that this undermines Walzer but it can also be interpreted to support Walzer. The Hasidim control membership in their religious community which allows the physical space of their neighborhood to be open while the social space of their neighborhood is closed. Tamir recognizes how this is accomplished: “National and cultural groups wishing to preserve their uniqueness thus draw invisible frontiers between themselves and all ‘others,’ and create closure by constructing ideological, religious, linguistic, and mainly psychological barriers between members and nonmembers.”²⁵ The claim is that closure can be psychological as well as physical. Closure at one level (physical or psychological) supports the openness at another level. If both levels were to be open (membership in the Hasidic community and participation in the public celebration), it is doubtful that the celebration to which Cole refers could continue to have the same social meaning because it is tied to a shared history that nonmembers do not share. Walzer’s strong claim is that the openness of neighborhoods is dependent on closure at some level. Walzer treats this need for closure as an element of human nature:

Neighborhoods can be open only if countries are at least potentially closed. Only if the state makes a selection among would-be members and guarantees the loyalty, security, and welfare of the individuals it selects, can local communities take shape as “indifferent” associations, determined solely by personal preference and market capacity...To tear down the walls of the state is not...to create a world without walls, but rather to create a thousand petty fortresses.²⁶

The alternative to state control of borders is either a Hobbesian state of nature with no controls or a global neighborhood. If Walzer is correct that these are the alternatives,

²⁵ Tamir, *Liberal Nationalism*, 166.

²⁶ Walzer, *Spheres of Justice*, 39.

then Cole's rejection of the neighborhood argument will not hold because he doesn't consider that analogy as expressing something in human nature. Cole's suggestion regarding regional models of membership, in which the state exercises authority over those in a geographic region but not who can be in that region, does not address Walzer's claim regarding the human need for closure which is not just about security and welfare, but about identity.

Cole also critiques Walzer's use of the family as relying upon an understanding of the family as being primarily natural, by which Cole means that that the relationships are based upon a kinship principle, it is blood that ties people together and creates connection. That is not enough from the liberal perspective because such connections are considered morally arbitrary from the liberal point of view. But Walzer is not bound by the understanding of the family as a natural entity. Families bind us together, whether they are natural or constructed; so also our common way of life binds us together. It is not the kinship that binds people together in political communities, but the commonness of their way of life. That commonness is not natural in the sense that it is tied to our biology. It is only natural in the sense that humans live within communities that create common ways of life. So just as in families, we find ourselves connected to people we have never met, so also members of nations find themselves connected to people never met but to which the connection creates obligation. Walzer doesn't need the family to be a natural entity any more than he needs a nation to be a natural entity. Cole has again overstated Walzer's use of the analogy.

My rejection of Cole's critique of Walzer argues that Cole holds a fundamental misunderstanding of Walzer's arguments. Cole recognizes that Walzer's use of the

analogues is intended to assist in the understanding of political communities. However, Cole extends the use of the analogies too far. Of the analogues Cole writes, “These three, then, become models of membership which can, or cannot, be applied to the community itself.”²⁷ The analogues are not used as models which are intended to be applied in total to develop political communities. Rather, they are applied in part to help us understand the concept of political community of which most people have only a vague awareness. Walzer’s argument uses the analogues to understand the nature of political communities, but the nature of the political community is based upon his theory of goods and understanding of human nature. Therefore, any disconnect between the membership models Walzer uses and the nature of political communities is only problematic if Walzer makes use of the features that are not relevant or if Cole can demonstrate that the feature of the membership analogue is not actually the way that Walzer understands it to be. Cole achieves neither of these ends. Nor does Cole offer a critique of Walzer’s theory of goods that might undermine Walzer’s argument. If Coles wishes to undermine Walzer’s understanding of membership he must focus his argument upon Walzer’s theory of goods, a task to which I will now turn.

The Problem of Membership as a Dominant Good

Walzer’s approach to justice as a system of complex equality is based upon his theory of goods. Membership is just one of the goods which communities create and distribute. Cole’s critique of Walzer is based upon problems he finds in the relevance of, or difficulty in, the analogies that Walzer uses. There are three additional approaches to critiquing Walzer’s approach to membership that are more comprehensive, none of which

²⁷ Cole, *Philosophies of Exclusion*, 62.

Cole has considered. The first is the argument from the nature of political community, either that political communities are where we should focus for justice or that political communities must be the way Walzer envisions them. Liberal concerns for justice and equality, however, make this a difficult argument to make. If justice is to be more than just hoped for outcomes there must be an authority adequate to enforce the criteria of justice. Although some religious organizations do this, when they do they are functioning in a manner similar to states, but have restricted their scope to members. Justice across a geographically wide and pluralistic community seems to require the state, or something like a state, to enforce the commitments of justice (however they are understood) across the different groups.

A second possible approach is to claim that the entire system of complex equality is somehow faulty. Richard Arneson writes, “complex equality is a very weak brew, in which any element of anything that could plausibly be identified with egalitarianism is so diluted as to be virtually undetectable...Walzer seems not to notice how little equality remains in his ‘complex equality.’”²⁸ Arneson argues that the autonomous distribution of goods within spheres is troubling because it allows some individuals to accumulate large amounts of some goods while others have little of that same good. This inequality cannot be made up by those with little in one sphere having more in another sphere. Complex equality, thereby, creates inequality rather than equality. Ronald Dworkin argues that the entire system is incoherent because the shared meanings of social goods that Walzer relies upon do not exist in pluralistic societies such as ours.²⁹ Of significance is that

²⁸ Richard Arneson, “Against Complex Equality,” *Philosophy and Public Affairs* 4(1990): 99.

²⁹ Ronald Dworkin, “To Each His Own,” review of *Spheres of Justice: A Defense of Pluralism and Equality*, by Michael Walzer, *New York Review of Books*, April 14, 1983.

there is no shared meaning of justice to which Walzer can appeal to defend his own theory. On such a model justice ends up relativistic and cannot be achieved.

The third approach is to focus on the problem of membership as a gateway social good. I will focus upon this latter argument as the one that bears the most promise for undermining Walzer's argument for my concerns in this thesis.

Recall from my earlier discussion that Walzer's account of justice within a system of complex equality requires that different principles of distribution be utilized within the sphere of each of the various social goods produced by society. Members may possess large amounts of any particular good relative to other members so long as the distribution is in accordance with the meaning of that good. If the meaning of that good, for example medical care, is tied to one's need for the good, then medical care could be distributed in unequal amounts based upon one's need for medical care. That one person receives substantial medical care is not unjust so long as there is a need for the medical care. Injustice occurs when an individual possesses large amounts of a good outside the relevant distribution principle or when possession of any good can be turned into possession of another good outside the control of the relevant distribution principle. Walzer's primary concern of justice is to prevent dominance, the circumstance in which any particular good can be turned into other goods contrary to the appropriate distribution principle. Membership, however, appears to escape from these distributive constraints in a very significant way.

Membership functions as a gateway social good. Only members, and those permitted by members, participate in the distribution of social goods. Without membership there is no ability to participate in the distribution of social goods.

Membership functions not only as a gateway social good, determining who gets in and has access to all other goods, but may also be understood as the social good that can legitimately be turned into every other social good. Membership becomes a dominant social good, convertible in some way to all other social goods. This problem has been observed by den Hartogh:

[I]n every domain he discusses, access to the goods of the domain is reserved to the same category of members. It follows that the sphere of membership cannot be fenced off from the other spheres in the way required by the nondominance principle: the possession of membership determines or codetermines one's share in the other spheres.³⁰

Den Hartogh claims this problem makes the principle of nondominance vacuous and undermines the principle of autonomous distribution, making Walzer's system incoherent. Den Hartogh resolves the problem by postulating that goods fall into two types of spheres: P-spheres in which the social good is distributed in accordance with some principle and D-spheres in which the social good is distributed in accordance with the meanings of the good or the principle identified in a P-sphere. Membership is a distributive principle and thereby, defines a P-sphere that is operative across all D-spheres. This approach to understand Walzer substantially reorganizes the relation between spheres in a manner that seems to be in conflict with Walzer's base theory of goods. It also seems to minimize the relevance of Walzer's principles of nondominance and monopoly. However, since Walzer requires the principle of nondominance for complex equality to work, it is better to recognize that on Walzer's account of complex equality the role of membership is unjust. The question to be asked is whether membership can be modified such that it no longer functions as a dominant good.

³⁰ Govert den Hartogh, "The Architectonic of Michael Walzer's Theory of Justice," *Political Theory* 27(1999): 494.

One obvious solution is to eliminate membership altogether so that the distribution of social goods occurs to those who are entitled to any particular good based upon the relevant distribution principle which will no longer include membership as a relevant factor. Goods are just distributed to anyone who is willing to participate in the exchange. Potentially this approach undermines Walzer's theory of goods in which goods obtain their meanings and their social roles from the community in which they operate. It is unclear what meanings goods would have if the community is unbounded. This problem may not, however, be as serious as it appears. The community may no longer be bounded in a legal or specified manner but still be bounded in a very real, practical way by those who choose to participate in it, similar to the Hasidic community presented by Cole. The use of goods by those who participate in the community will help social goods obtain their meanings. Participation, rather than membership, becomes the relevant factor. This is perhaps a subtle distinction from the idea of membership but it reflects the activity of the individual rather than the status of the individual. Participation can be open to all who choose to participate by their actions. One risk associated with open participation is that the meanings of goods may be shaped by new participants in ways objectionable to existing participants. Meanings attached to social goods are always subject to change, but in an open scenario the rate of change may become unacceptably quick or the direction of the change may be contrary to the desires of existing members. It is unclear how to address this problem without utilizing membership and controlling who becomes a member. Certainly those who object to the rate of change have the option of forming new groups and controlling the goods within those groups. This process, however, reinforces Walzer's argument about the nature of

goods. Separating the goods from political communities doesn't change the way in which goods function, it only changes the available enforcement mechanisms. Controlling change to the meanings of social goods by controlling participation (e.g., deciding who can participate) returns us to the original problem in which membership functions unjustly as a dominant good because controlling participation in this sense is the same as controlling membership.

One might also simply think of membership as a precondition, rather than as a good to be distributed. In this sense one is or is not a member in the same manner in which one might be of age, or not of age, to vote. This approach, however, seems to undermine the emphasis that Walzer wishes to put upon membership as a good that can be distributed or not to others. When age is a precondition, it is achieved as a result of a natural process. If membership is a precondition, it is uncertain how one obtains it unless it is a good that can be distributed. If it only results from a natural process, such as birth to those who are already members, then membership cannot be granted to those who are born to nonmembers because it is not a good to be distributed. The precondition approach is actually more restrictive than Walzer's approach because it is difficult to see how one meets the precondition if one does not already possess the relevant attribute.

Within Walzer's scheme of complex equality it does not seem possible to truly eliminate membership as a gateway good. What is possible is to change the conditions under which membership (or the benefits thereof) is granted or denied. Under Walzer's understanding, membership rules are established based upon the desires of the community without other moral constraint. However, it is possible to develop rules of membership that implement binding moral constraints that are not tied directly to the

desires of the community members. I do not intend to identify all such possible constraints, but certainly an obvious constraint would be the functionings of social institutions.

Suppose that a bounded community has determined to establish a public education system that includes publicly funded early education and a robust and integrated arts program among other possibilities. Such education programs are highly attractive to many people today. In order to gain the benefits such programs must be adequately funded and operated in particular ways, including low teacher-student ratios and the provision of supplies. Metrics could be established to indicate when this education system is functioning properly. When these standards are met, then membership would be open. When the standards are not met, membership could be closed (or growth limited) until such time as the standards could be met.³¹ Such a system is not perfect and could be open to xenophobic manipulation. However, the idea at work is that the community is justified in ensuring that important aspects of the community work as intended and are unaffected by changes in membership. Membership, therefore, remains a gateway good, but one that is more easily accessible to those who do not already possess it. I will explore this idea further below in Chapter 5.

National Identity and Culture Arguments

The problem of cultural homogeneity and political organization has a long history in political theory. It is widely believed that in order for people to form a cohesive and functional political organization there must be a cultural base shared among the members

³¹ An alternative way to consider this is as a problem of scarcity. When the educational system is functioning adequately the good of this type of education is not scarce; when there are problems in its functioning the good becomes scarce or not available.

adequate to provide a common framework and create trust between members.³² This shared cultural base, when it shapes a community in significant ways over long periods of time, becomes a national identity. National identities may or may not coincide with states. States may be composed of a single national identity or multiple national identities. Similarly, national identities may be split between two or more states. Regardless of these types of problems, closed border theorists claim that states have an identity that shapes and molds the people who live within that state. The strong influence of this identity upon the residents of any country gives those residents an interest in maintaining, or at least attempting to control change to, that identity. It is the legitimate interest in maintaining the national identity in which one participates in which the second type of argument regarding closed borders is found. The best known proponent of this view is David Miller. In an alternate approach to this problem, Meilaender claims the first question states must face in developing immigration policies is, “Who are we?” Until, and unless, a country knows what it is and who it is, it cannot determine how to respond to those who wish to enter. Meilaender’s argument varies from Miller’s in that it starts with the state rather than the nation. Rather than a shared culture it is political authority that is shared. When that authority is confronted by those outside its authority, the question that arises is about identity. However, the end point of both views, that shared identity creates a presumptive right to control borders, is similar. Collectively these views are widely referred to as “liberal nationalism.”³³ I will begin with Miller’s view.

³² For example, see John Stuart Mill, *Considerations on Representative Government* in *On Liberty and Other Essays*, edited by John Gray (Oxford: Oxford University Press, 1991), 427-430.

³³ I will neglect Yael Tamir’s account in *Liberal Nationalism* in which she offers a different variant of the argument. Tamir argues that culture provides the background conditions for meaningful lives and without

Miller on National Identity and Culture

Miller has a robust body of work focusing upon the problems of nationality and national identity and the roles these two concepts play in both social justice and global justice. They influence social justice because compatriots have special obligations to one another that they do not have to those outside the country. It is not that citizens of a country have no obligations to noncitizens; rather, the obligation set for each is different. The two concepts influence global justice because they help to understand the kinds of obligations we have to those outside one's country, including the question of whether people have the right to cross borders without constraint. Miller's understanding of these concepts and the role they play in justice leads to the conclusion that would-be immigrants do not have the right to enter a country of their choosing and that countries, with constraints, are acting morally when they choose to control their borders and deny entry to some, or even all, individuals.

Nationality is a distinct concept from state. State represents a political organization with a monopoly of power in a particular geographic region. Nations, however, represent a group of people with a common way of life who conceive of themselves as sharing this common, and presumably, unique way of life. Miller emphasizes this twofold nature of nationality: "So if we say of a set of people that they compose a nation, we are not merely saying something about their physical characteristics or their behavior, we are also saying something about how they conceive

such a culture it is doubtful that any life could be meaningful. Therefore, people have a right to a culture which also entails the right to preserve the culture. Tamir has little to say about the problems of borders and migration. It has also been questioned whether Tamir is a nationalist at all since in portions of her text she argues for the demise of the state in favor of regional associations (See Ronald Beiner, Introduction to *Theorizing Nationalism*, edited by Ronald Beiner (Albany, NY: State University of New York Press, 1999), 8, for this critique).

of themselves.”³⁴ It is possible for people to share a common way of life, as much of the contemporary West does, and not conceive of themselves as a nation or as people who share the same political organization. Miller therefore indicates the difference between a nation and a state: “nation must refer to a community of people with an aspiration to be politically self-determining, and ‘state’ must refer to the set of political institutions that they may aspire to possess for themselves.”³⁵

When we keep these two concepts separate,³⁶ it is possible to explore in further depth the different aspects of nations that lead to the existence of a national identity. Miller identifies five: belief, historical continuity, active identity, geographical place and a common public culture. The legitimacy of the features of nations that lead to national identities in turn provides justification for the claim to political self-determination. The legitimate claim of political self-determination in turn provides the justification for controlling borders. When this process³⁷ fails to meet the requirements of legitimacy, political self-determination and the corresponding right to control borders will fail to be justified.

Nationality requires a belief that a group exists in which the members hold special obligations to one another and self-awareness that one is a member of this group and therefore, holds these special obligations. Miller writes, “National communities are constituted by belief: nations exist when their members recognize one another as

³⁴ David Miller, *On Nationality* (Oxford: Clarendon Press, 1995), 17.

³⁵ *Ibid.*, 19.

³⁶ Miller identifies a third distinction that must be made, between nationality and ethnicity. Although these are closely related and nations often arise from ethnic groups, they are not the same. This distinction is not significant for my work here.

³⁷ The use of “process” here is very loose. Each step here can be contentious and there is no authority to certify or evaluate that this “process” has been properly followed.

compatriots, and believe that they share characteristics of the relevant kind.”³⁸

Nationality is not something that can be recognized by the outsider; it must first be recognized by those inside the group. If they fail to identify as a community, then there can be no nation regardless of what those outside the group may think. This identification must be one of mutual recognition; it is insufficient for a single individual to feel these obligations, they must be felt by many. This recognition of identity is also not tied to observable characteristics, such as language, religion or race. It consists principally of a felt identity. This self-awareness has built into it the idea of insiders and outsiders, that those within share something that is not shared with those outside. This belief does not have to be objective, verifiable by those outside. Although problematic because it admits of the problem of fictitious nations, Miller claims it is enough that those inside hold to this belief. This self-awareness, therefore, is highly subjective and may be transient. The nation exists only so long as the people hold the belief. If the belief is no longer held, then the nation passes out of existence.

This transience leads to the concern that nationalities can pop in and out of existence. The second aspect of nationality is intended to eliminate this problem. Nations must have some kind of historical continuity. Nations stretch back into the past, sometimes into the “mists of time.” People who are nations have shared passage through different kinds of events: wars, natural disasters, successes and failures. Through these events the community held a shared sense of obligation to one another to participate in the struggles of the community. These struggles are intended to build something better than what is, and therefore, nations reach forward to the future. People who are nations share a vision of the future together, and in Miller’s language, a future that cannot be

³⁸ Ibid., 22.

renounced.³⁹ This historical continuity, while intended to mitigate the problem of transience is not intended to indicate the absolute permanence of national identities. Identities come and go, but they do so slowly.

Nations do not just have continuity into the past and the future, they are active today. Nations live together, making decisions that shape and mold their community in the present. These actions are made with a complete awareness that they build on the past and reach for the future, tying the past and future together. It does not matter what the content of these actions is, whether at some future time these actions will be looked upon favorably. The actions of today may be considered shameful at some point down the road. What matters is that there is a current attempt to do things together, to respond to both internal and external events as a community, continuing to shape itself by the decisions it makes today.

Nations, although first and foremost composed of people, are also tied to a geographic region. There must be a place to which the nation is tied in the past and in the future. Even if the present is a diaspora, there is somewhere from which the nation has been dispersed and longs to go back to. This attribute importantly creates the aspiration to be a state as well as a nation, to exercise political power in that area that is perceived as the homeland. The denial of control of this land may be long term, but it doesn't undermine the recognition of to which land this people belongs. The ties to a geographic area and the present activity of a group provide for Miller the two features that separate nations from other groups, such as sports teams, or religions, with which people often closely identify.

³⁹ Ibid., 24.

Finally, this self-aware group of people must share what has been referred to as “national character” but Miller prefers to call it “a common public culture.”⁴⁰ A common public culture is “a set of understandings about how a group of people is to conduct its life together.”⁴¹ Among the necessary characteristics are shared political principles and cultural ideals such as religious beliefs or language. There is no need for monolithic cultural edifices; nations can tolerate diversity and subcultures provided that there is a shared way of life. Public culture doesn’t eliminate all, or even most, variation in private culture. Neither must this common public culture be explicit and identifiable by each of its members. In some cases one may only recognize that there is difference between oneself and others of a different nation. Miller explicitly brackets out shared biological ancestry as an acceptable element of the common public culture because it leads to problems of racism.⁴²

Nations, so conceived, have a right to self-determination. Three reasons provide justification for this claim. The first is that this conception of national identity creates obligations, including those of distributive justice.⁴³ “Nations are communities of obligations, in the sense that their members recognize duties to meet the basic needs and protect the basic interests of other members.”⁴⁴ These obligations are best identified, fulfilled and enforced within a state. When nations are split between states or share the state with other nations, the obligations recognized by the national culture encounter

⁴⁰ Ibid., 25.

⁴¹ Ibid., 26.

⁴² This perfectionist element seems out of place in Miller’s conception of identity. Although biological ancestry may lead to racism, it seems completely consistent that it could be a part of a common public culture with the other elements of national identity, especially the aspects of belief and historical continuity. Miller provides inadequate grounds at this point to eliminate biological ancestry as an unacceptable element of public culture.

⁴³ Ibid., 83-85.

⁴⁴ Ibid., 83.

substantial obstacles to their fulfillment. Secondly, this shared way of life, which shapes both individual lives and lives together, is important and subject to protection. National identities provide the background within which most people develop their own identity. Individuals do not come into the world in a manner devoid of community, but rather are part of a community that shapes their identity from the moment of birth. It is not that national identity is the only cultural resource available to people; but it is the first and one that for most people remains significant throughout their lives. To deny the right to self-determination to nationalities is to deny the nationality its very existence.⁴⁵ Finally, there are reasons of autonomy. The liberal conception of the person presumes that individuals have interests which include shaping their relations with those with whom they associate and identify. Groups of people who identify with one another also share this interest of shaping their relations. Political self-determination provides one avenue of recognizing this interest. Nations are, therefore, entitled to decide how to express this national identity and how this identity may be shaped.

Miller recognizes that this claim of self-determination and political autonomy requires the further justification of political autonomy. The general right of a state to exercise authority within a particular geographic region requires justification. If this cannot be justified, then nations can have no right to self-determination and political autonomy. Further justification is also required as to why any particular state exercises authority over this particular geographic region.

The modern state fulfills a wide range of functions which cannot be fulfilled without authority over a defined geographic area. The justification for the existence of

⁴⁵ Tamir would state that it denies individuals, rather than states, the possibility of a good and meaningful life.

authority and the boundaries of that authority is utilitarian: they enable both people and the state to accomplish what would not otherwise be possible. “Assuming that such activities are broadly advantageous to citizens, the justification for states having the right to exercise their authority over a given territory is utilitarian in character: everyone subject to such authority can expect to benefit from its existence.”⁴⁶ The implication is that any person standing in a particular spot is subject to whatever government exercises authority over that spot because of the benefits the person receives. Miller is silent here regarding the case in which the activities of state are not advantageous to the citizens; but this does not undermine his argument. The authority of the state must include who can stay “since a system of territorial authority cannot function without some control over who falls within its scope.”⁴⁷ The number of people in a state determines the kinds of benefits that can be offered, how these benefits are to be provided and the burdens placed upon those who provide the resources associated with those benefits. Since many of these benefits are viable only over longer periods of time or stable population bases, high levels of fluctuation in population undermine the ability of the state to plan and carry out its functions as do demographic shifts in population, such as aging. Assuming that the level of benefits provided reflects some aspect of the national identity held by these people, changes to the ability to provide the same benefits will influence the national identity. The boundaries of authority also enable individuals to know to whom they are subject and what their obligations are. This in turn enables individuals to conduct individual projects that would otherwise be at risk.

⁴⁶ Miller, *National Responsibility*, 215.

⁴⁷ *Ibid.*, 215-216.

As to the second problem of why this state in this territory, Miller's first response is that international law generally recognizes a state's authority if the exercise of that authority is effective and respects human rights. One reason to stop here, is that to raise the bar higher is to invite irresolvable arguments over specific borders. But because there are lots of examples of creating and consolidating countries, some further justification of territory is required. Miller's answer is the contractarian notion of consent of the governed: "States can only claim territorial rights, in my view, as representatives of the peoples that they govern: such rights, in other words, belong fundamentally to the people collectively and are exercised on their behalf by the state they have authorized to do so."⁴⁸ The combined conditions of effectiveness and consent, however, are not adequate for they do not provide any real limits on geography. To provide limits upon the geographical reaches of state Miller will appeal to the interaction of nations and the land they occupy.

Consider the case where a nation over a long period of time occupies and continues to occupy in the present a piece of land. Over time, their culture has interacted with the land to shape the culture; the culture has also shaped the land. These people have rights to a territory:

It has become the people's home, in the sense that they have adapted their way of life to the physical constraints of the territory and then transformed it to a greater or lesser extent in pursuit of their common goals...this is sufficient for us to say that the nation is responsible for the eventual character of the territory it inhabits.⁴⁹

From this story the nation has legitimate claims to the enhanced value of the land which cannot be separated from the land. Retaining that enhanced value requires retaining the

⁴⁸ Ibid., 217.

⁴⁹ Ibid., 218.

land. However, this Lockean notion that a right of possession is obtained by mixing one's labor with something is not the only grounding of the claim to territory. The significance of the land to the people is more than just its economic value; the land possesses symbolic significance:

Living on and shaping a piece of land means not only increasing its value in an economic sense, but also (typically) endowing it with meaning by virtue of significant events that have occurred there, monuments that have been built, poems, novels and paintings that capture particular places or types of landscapes.⁵⁰

This emotional attachment to place, which contributes to the identity of which these people are aware, both creates and justifies political authority over a place. The strength of such claims may vary and are not always straightforward, but generally this process, which Miller calls “the occupancy/transformation basis for territorial rights,”⁵¹ is adequate to justify political authority over some region.

Miller recognizes that there are several standard objections to his justification of the state and its authority over a geographic region. It might be claimed that occupancy and transformation only count if the occupier has a right to the property to begin with. Analogous to the theft of property, an unjust occupation shouldn't generate legitimate property claims. Miller's response: For short time occupancy this is correct. But over the long term an occupier who expels an original occupier may come to have claim to the property, although they may still owe compensation to the original and expelled occupier as based on Miller's account of historical responsibility. A second response is to think about who might actually have an unblemished right of access to any land. The conditions for such unblemished rights would be so difficult to achieve that no one would

⁵⁰ Ibid.

⁵¹ Ibid., 219.

have rights to any land, given the length of time in which most portions of the world have been occupied. Therefore, the claim regarding rights to property has historical limitations that prevent it from being anything beyond a *prima facie* moral principle.

Another objection is that the analogy to private property rights is not appropriate. Immigrants have the right to enter land to save their lives. Miller's response: This is a kind of remedial right, held against all people or countries who can meet that right. The territorial rights are not absolute, but neither are the immigrant's rights. An immigrant in need of refuge has the right to that refuge but not the right to demand who provides it:

...the immigrant cannot demand admission to any particular state: his rights do not trump rights to territorial integrity, even though they cast a shadow over the rights. The shadow they cast is that a state that claims legitimate authority over a territory must also take reasonable steps to protect the human rights of those whose position is worsened by the boundaries it defends – which might mean, in special circumstances where there is no alternative, allowing them to come ...In other words, it cannot, ethically speaking, defend its boundaries and do nothing else in a world where human rights are in many places insecure.⁵²

The rights a state holds regarding boundaries must look in two directions, both inward and outward, to measure the effects of its control. The control of borders is not a right to be exercised without regard for its effects.

There is also another possible objection which Miller does not seem to consider: Why is it not adequate to say the scope of authority is whoever is in the land? This concept is readily accepted by many. For example, Hobbes accepts that people move and when they do they come under the authority of the state that is there.⁵³ Miller, I believe, conflates the problem of state legitimacy with the conceptualization, justification and limitation of state authority. State legitimacy is concerned with the justification of

⁵² Ibid., 221.

⁵³ Thomas Hobbes, *Leviathan* (Indianapolis: Hackett Publishing, 1994), 145. See also the regional model of Cole, *Philosophies of Exclusion*, 75-76, and Walzer's discussion of Otto Bauer in *Spheres of Justice*, 44.

particular political institutions. Why do these political institutions have a claim to exercise power in this area? Contemporary theory generally grounds political legitimacy in the consent of those governed. State authority is grounded in the political legitimacy of the state. States without political legitimacy wield authority without justification and there is no presumption that citizens should obey that authority. Where there is political legitimacy there remains the question of the limits of the authority exercised by political institutions. What actions are political institutions justified in taking? States require some kind of authority simply to function as a state. If this is the case, then the grounds of authority is in state function, which still leaves the problem of justifying the scope and means of that authority. On the regional model of authority the state exercises its authority over whoever is in its territory. When one crosses a border, regardless of intention or duration of stay, one becomes subject to the sovereign in that area. This seems to be a fairly unproblematic approach. However, this approach still would require some distinction between those who intend to take up residence with its accompanying benefits and obligations and those who only intend a short stay and therefore require a smaller set of benefits and obligations appropriate to the duration of their visit. A further complication is the negative effects of large and unexpected movements. Such movements might stress the ability of state institutions to fulfill their functions. Many state functions require long range planning which could be undermined by unconstrained movement. The significance of this discussion is not to claim that a regional model could never work; rather, it is that regional models can face the same negative effects of movement that the state will desire to control in a manner similar to Miller's national states. This claim does not undermine Miller's argument utilizing national identity.

One final question remains for Miller to answer: If it has been justifiably established that immigrants do not have, generally, a right to enter, and that states can justify their right to territory, should (ought) states exercise that right, and if so, how should (ought) they exercise it? The state needs to justify its exercise of that right under particular conditions. “An adequate explanation will be one that links immigration policy to the general goals of the society in question. These goals will reflect existing national values and will ideally be set through a continuing process of democratic debate.”⁵⁴ This debate, which will be ongoing and occur under different circumstances, will lead to different decisions regarding immigration control that reflect those circumstances on different occasions.

My claim here is not that the interests of current citizens will always outweigh the interests of those who would wish to immigrate, supposing we could find a neutral metric by which these interests could be compared. I am appealing instead to the value of self-determination, to the importance to a political community of being able to determine its future shape, including for example the balance it wishes to strike between economic growth and environmental values, and pointing out that question of membership are intimately involved in such decisions.⁵⁵

This position recognizes the claims of would be immigrants, but doesn't let those interests trump (be lexically prior to) the interests of the receiving state. What is unclear here, in Miller's argument, is how it would not be the case that the interests of the receiving state will always trump the interests of the would-be immigrant. It appears as if all of the power resides in the hands of the receiving state unless some better standard for determining the outcome of the democratic deliberation is developed. Miller assumes that democratic debate will limit the ability of the debate to be completely parochial, but it is not inconceivable for groups to only consider their interests. It is also the case that

⁵⁴ Miller, *National Responsibility*, 222.

⁵⁵ *Ibid.*, 223.

one can reach this conclusion permitting border controls via a different path, one acceptable to liberals: the protection of liberal institutions themselves. On this account Whelan writes:

A liberal may properly compromise liberal principles in practice, in the nonideal world, when this appears to be necessary *in order* to preserve or strengthen them...In this spirit a liberal might...uphold the traditional (and admittedly nonliberal) sovereign power over borders...but might also support restrictive policies on these matter.⁵⁶

Liberals will care about how borders are justified, which might lead them to reject Miller's national identity argument and accept Whelan's protection of liberal institutions argument. The result, however, is the same, and to the extent that liberal institutions form a part of the national identity, the arguments are very close to the same.

Miller's argument utilizing national identity is based upon a descriptive account of national identity: he examines what is in order to give his account of national identity. This descriptive project is then used to provide the foundations for a normative argument justifying the different treatment of those who do not share that identity because they do not share this identity. This approach bears the risk of committing the is-ought fallacy, concluding that because something is that it is also what should be. That people hold national identities is without dispute; that they are entitled to hold and protect these identities seems to require a more robust defense than what is offered. This concern is evident in Cole's critique of Miller's argument and it is to that critique I now turn.

Cole on Liberal Nationalism

The sole sustained critique of the accounts of liberal nationalism related to immigration is found in Cole's *Philosophies of Exclusion*, where he takes up a multi-

⁵⁶ Whelan, "Citizenship and Freedom of Movement," 17.

pronged attack upon both Miller and Tamir's accounts of closed borders. The general thrust of Cole's argument is that neither Miller nor Tamir can maintain a project that successfully defends the status of states as ethical communities adequate to justify the exclusion of outsiders without resorting to an ethical relativism that is indefensible from the liberal viewpoint.

Miller, in parts of his argument that I have not reviewed here, appeals to the distinction between ethical universalism and ethical particularism.⁵⁷ Ethical universalism makes the claim that moral principles must be equally applied to all persons and that the particulars of relationships and circumstances are not relevant to our moral obligations. Ethical particularism, on the other hand, claims that our moral obligations are such that questions of whether we have obligations in particular cases or to whom we have more demanding or prioritized obligations is influenced or determined by the relationships we have with people. Miller writes, "Ethical particularism...holds that relations between persons are part of the basic subject-matter of ethics, so that fundamental principles are attached directly to these relations."⁵⁸ In Miller's account the nation is an ethical community that creates ethical obligations to members of the nation without creating similar obligations to those outside the nation by drawing upon the sentiments we have for compatriots: "ethical life must be a social institution whose principles must accommodate natural sentiments towards relatives, colleagues, and so forth and which must rely upon a complex set of motives to get people to comply with its requirements."⁵⁹

⁵⁷ See Miller, *On Nationality*, Chapter 3.

⁵⁸ Ibid., 50.

⁵⁹ Ibid., 58.

Our membership in a nation creates obligations because of our attachment to that nation.⁶⁰

Cole's interpretation of ethical universalism and ethical particularism is found in two principles. Ethical universalism is made manifest in a principle of humanity, whereas particularism results in a principle of community. These two principles appear in Cole's work as exclusive and irreconcilable to each other. Liberal nationalism makes the principle of community outweigh the principle of humanity. Liberalism's commitment to egalitarian principles requires the principle of humanity to outweigh the principle of community. Cole's concern is that the arguments leading to the conclusion of liberal nationalism results in one of two things: a thick ethnic identity that excludes outsiders but is indefensible to liberalism or a thin civic identity that is defensible to liberalism but has no nationalistic character to it. In either case, liberal nationalism fails to be what it claims: a form of liberalism that justifiably excludes outsiders (by integrating the two principles).

Cole's argument against Miller's form of liberal nationalism in detail is this:

1. Liberal nationalism rests upon moral communitarianism, in which the principle of community outweighs the principle of humanity.
2. For this to hold as a liberal perspective, it must be demonstrated that the nation as community has moral value compatible with the liberal tradition.
3. Miller's justification of the nation as an ethical community appeals to the idea that communities are by definition ethical because they include relations of reciprocity.

⁶⁰ Ibid., 65-73.

4. This claim permits the relations of any community to outweigh the demands of liberalism as expressed in the principle of humanity.
5. Some such communities, e.g., racist communities, are for purposes contrary to liberal principles.
6. Therefore, the appeal to the nation as community is inadequate to ground ethical obligations that exclude outsiders compatible with liberalism.

Cole's concern in the arguments is twofold. The result is either a kind of ethical relativism in which moral obligations are just whatever various communities determine them to be or we find ourselves in a position in which there can be no moral evaluation about the kinds of communities there are. All communities have to be accepted, which undermines the central moral and egalitarian concerns of liberalism. When this position is then applied to the problems of immigration, any control policies developed either cannot be justified to those outside the community or collapse into a kind of national conservatism because they are based in controlling the numbers of problematic peoples admitted or require a kind of pious commitment to the receiving nation. Both of these positions are troubling from the perspective of liberalism.

Evaluating Cole

The argument of Cole against Miller rests upon the conflict between the commitments of the principle of humanity and the principle of community. Without argument Cole assumes that these two principles are incompatible, that one must choose either to extend moral obligations universally, to each person equally and without distinction or one must commit to the priority of community in which there appear to be

no moral obligations to those outside the community. This is a debate about the role of boundaries in moral obligations. Cole writes regarding particularism:

From the particularist perspective, we have seen that we begin our moral reasoning from relationship facts about ourselves and others: our rights and duties, expectations and obligations, arise from these relationships. Therefore, these relationships generate moral principles...those who are not in the relationship are excluded from the rights and responsibilities that arise from it; moral duties and expectations cannot extend beyond the relationship.⁶¹

What Cole finds operative in this understanding are principles of legitimation and principles of distribution. Legitimizing our moral principles extends only to members of the community as also does the application of these moral principles. To those outside the community members owe nothing.

This is, however, too strong a claim. Miller's argument from particularism can ground obligations to those outside the community to the extent that those within the community are in relationship with those outside the community. But Miller also recognizes that we have duties to people simply based upon their humanity: "The duties we owe to our fellow-nationals are different from, and more extensive than, the duties we own to human beings as such. That is not to say that we owe *no* duties to humans as such."⁶² These duties are best understood in terms of "basic human rights" rather than in terms of welfare.⁶³ The claim of Miller is not that there are no obligations to those outside, but that they are different obligations. Different relationships ground different obligations. People in close, enduring relationships ground more demanding obligations to one another, whereas people in distant, transient relationships ground less demanding obligations. The nation, which has significant influence upon the meanings in life is a

⁶¹ Cole, *Philosophies of Exclusion*, 92.

⁶² Miller, *On Nationality*, 11.

⁶³ *Ibid.*, 191.

community of close and enduring relationships and therefore, grounds demanding obligations. Relations with those outside the nation ground less demanding obligations. But obligations to compatriots and noncompatriots can be understood as duties of justice. Justice demands one thing of us domestically and another globally. This should be understood in two ways. The first is the priority of provision. The protection of rights and provision of well-being falls first to compatriots and secondarily upon noncompatriots. When societies are unable or unwilling to protect rights domestically the burden of protecting those rights may fall on outsiders. The second understanding is the extent of the rights and well-being provided. Global justice does not demand global equality of whatever measure we are concerned with (e.g., resources, opportunity, welfare). Inequality can exist on a global level so long as some “global minimum that is due to every human being as a matter of justice” is provided. Different obligations and duties to compatriots and noncompatriots may coexist.⁶⁴

It is also not the case that the community can ground just any obligations and that these obligations are not without scrutiny by other moral principles. This has two aspects. The first is that we have obligations to those outside our community, such as refugees. But there is a variety of ways to fulfill those obligations. It is not inconceivable that nations can close their borders and still fulfill those obligations. Miller also notes that states should have some latitude in responding to asylum requests because making the request lies in the hands of the refugee who may pass over some legitimate opportunities thereby causing a disproportionate burden upon a single country.⁶⁵ The second is that some principles that are external to the community, when understood as a

⁶⁴ Miller, *National Responsibility*, 231.

⁶⁵ See Miller, “Immigration: the Case for Limits,” 224-230, for a more detailed discussion of this.

nation, are still applicable to the nation as community. The principle of harm, rooted in a particular view of human nature and natural rights rather than in a particular community, can be applied to the obligations of the community and limit obligations that arise from the community.⁶⁶ Obligations to not harm others prevent one from performing certain actions that might benefit one's compatriots. Miller's conceptualization of responsibility and its application to national responsibility seeks to make this claim.⁶⁷ The claim I am making here is that both the principle of humanity and the principle of community can give rise to moral obligations. It might be that the two principles are necessarily exclusive, but I believe that that argument is difficult to make and Cole does not make it. I will, in Chapter 5, develop an argument that does attempt to encompass both principles in relation to immigration.

Arguments from Single Principles

Freedom of Association and Closed Borders

The final kind of liberal argument defending the state's right to close its borders is the argument from single principles. These arguments, like the arguments from principle in the open borders school, take some liberal principle and explore its meaning and then demonstrate that when understood in a particular way, this principle defends the state's right to close its borders. The most prominent example of this in the closed borders school is the 2008 article "Immigration and the Freedom of Association" by Christopher Heath Wellman.

⁶⁶ See the section on Wilcox's Global Principle of Harm in the next chapter.

⁶⁷ Miller, *National Responsibility*, Chapters 4 and 5.

Wellman's article, awarded the Kavka Prize⁶⁸ in 2011, focuses upon the freedom of association, the right of people to choose with whom they wish to associate. Wellman draws a strong conclusion, claiming that "every legitimate state has the right to close its doors to all potential immigrants, even refugees desperately seeking asylum."⁶⁹ This is an extraordinarily strong conclusion to draw from a single principle and I will argue that Wellman overstates the claim of his argument.

The freedom of association is widely regarded as an important right for the individual. Wellman points out that this right has two faces: it not only includes the right to associate but it also includes the right to not associate, or to disassociate.⁷⁰ We come together with others and we refuse to come together with others. This right is particularly important in self-regarding affairs, such as marriage and religion. While it once was the case that marriages were arranged, in liberal communities it is widely believed that one should choose one's own spouse. Similarly, one should be able to choose (or not choose) a religious affiliation based upon the meaning that religion provides for the individual life. Both of these examples demonstrate the right to disassociation as well. One has the right to choose one's own spouse, but others have the right to refuse an offer of matrimony. Similarly one has the right to choose with whom one wants to worship but no group is obligated to permit anyone who wishes to worship with their group.⁷¹

⁶⁸ This prize is awarded in odd number years by the American Philosophical Association for the best paper published in political philosophy in a two year span.

⁶⁹ Christopher Heath Wellman, "Immigration and Freedom of Association," *Ethics* 119 (2008): 109.

⁷⁰ See Stuart White, "Freedom of Association and the Right to Exclude," *The Journal of Political Philosophy* 5(1997): 373-391, on the right to not associate as part of the right of freedom of association and possible constraints on the right to not associate. It is unclear in both White and Wellman whether the right to not associate and the right to disassociate are different. One possible understanding is the right to not associate applies to establishing new associations, whereas the right to disassociate applies to terminating existing associations. As Wellman appears to treat them as the same right I will do the same.

⁷¹ However, it should also be noted that many religious communities have traditions of accepting all-comers and this claim would be impossible to defend from the position of the religious community.

The step from the individual right of association to the state's right appears straightforward at this point: "just as an individual has a right to determine whom (if anyone) he or she would like to marry, a group of fellow-citizens has a right to determine whom (if anyone) it would like to invite into its political community...a state's freedom of association entitles it to exclude all foreigners from its political community."⁷² Although this conclusion appears straightforward, Wellman points to two possible objections.

The first objection claims that there are substantial moral differences between groups and individuals such that what is true of the individual is not true of the group. The second objection is that if it is possible for groups to have rights and interests, perhaps the interests of groups should receive less priority than the rights and interests of individuals. Wellman deals with each of these quickly. Using the examples of Augusta National Golf Club's exclusion of women and the Boy Scouts of America exclusion of homosexuals and atheists, Wellman points out that the concern with membership in these cases isn't that the groups shouldn't determine their own membership, but that in certain cases the presumed right to self-determination can be overridden by more important social needs.⁷³ The presumption remains that groups still have a *prima facie* right to determine their own membership in most cases. After all, as White notes, "What makes it their association, serving their purposes, is that they can exercise this 'right to exclude.'"⁷⁴ It is only in rare cases that the interests of society to require inclusion will override the presumptive right of the group to determine members, which includes the possibility of excluding some who desire to belong.

⁷² Wellman, 110-111.

⁷³ This position is similar to the argument of Cole in Chapter 2.

⁷⁴ White, "Freedom of Association," 373.

However, perhaps states are still different than groups because citizenship is not an autonomous choice – it is received by one’s status at birth. Wellman rejects this claim as well by exploring the implications of denying the right of association to states. Imagine the circumstances where Canada might be compelled by others to join NAFTA or Slovenia to join the European Union. It is difficult to imagine circumstances in which either could be forced to join these organizations or the conditions in which the organization would be required to admit either of the states. Such a move violates the state’s right to self-determination, a right which enables each individual state to determine with whom it wishes to associate or not. In an even more extreme example, Wellman claims that the only thing that prevents unilateral annexation of one country by another is the recognition of the right to self-determination. If this right does not exist, then there are no grounds for objecting to any annexation provided that it is peaceful and does not violate the other rights held. The only ground by which unilateral annexation is understood to be wrong is the right to self-determination of countries. Hence, the right of groups to self-determination and to control their membership still stands: “Freedom of association is not something that requires an elaborate justification, then, since it is simply one component of the self-determination which is owed to all autonomous individuals and legitimate states.”⁷⁵

The crux of this argument requires understanding that the right of association belongs to both individuals and states. Even if the right of association for individuals for purposes such as marriage is more important than the right of members of groups to not associate, it does not lead to the conclusion that groups (and states) do not have this right. The claim that one may not ever actually associate with some member also does not

⁷⁵ Wellman, “Immigration,” 114.

undermine a group's right to association. Newly admitted members have a say in how some group will be in the future, and how the group will be in the future is something that existing members legitimately care about. Hence, existing members care about how new members might affect the future of the group. This perspective regarding groups applies to states, as has already been demonstrated above in Miller's argument regarding national identity and character.⁷⁶

What of the second objection? Is it not possible that an individual's interest in entering a country ought to outweigh the group interest of the state in keeping someone out? Wellman points out that membership in one's own country is important, for many reasons. Since people care about their membership in other kinds of organizations they care about, it is only natural that they care about the membership of their state, and in fact, we find that people care a great deal about their countries and recognize that the membership of the state affects the policies the state promulgates. The fact that most citizens never associate personally with most other members of the state is irrelevant because together they make decisions that affects each other's lives. Given the possibility of this effect, citizens care about the composition of the state, and rightfully so. If people and groups have the right to self-determination, an important part of that right is determining who makes up the "self" in the case where the "self" is a composite. Hence, as part of both individual and group self-determination, states have the right to determine who is admitted and allowed to become a member.

⁷⁶ Wellman distances himself from this national identity and culture argument on the grounds that Miller is specifically invoking a national identity as something worth preserving. Wellman's claim is broader in that it justifies controlling membership in light of the possibility of change to any aspect of the organization and does not wish to make any claim regarding the value of national identity or cultures. The right of association belongs to both individuals and groups regardless of whether there is any distinctive characteristic. My understanding is that Miller is identifying national identity or cultures as one such aspect of a state that people legitimately care about and are therefore, on Wellman's account, justified in controlling membership in order to preserve or control change to that identity. *Ibid.*, 117-119.

Wellman's conclusion is that states have the right to control membership, whether or not they in fact do so. States may find themselves in a position where their interest is to open their borders, whereas at other times it is in their interest to close them. Both positions are justifiable. The argument is not strictly consequential or utilitarian regarding open borders. It isn't a claim that either open or closed borders brings about some best outcome. Such a decision is contextual and empirical. The argument is deontological in nature; states have the right to make the decision regarding association and there is no right decision. Wellman is also careful to distinguish his argument from that of culture and identity associated with David Miller. The important distinction is that the freedom of association tied to self-determination is available to anyone, not just to those groups who have a particular history or form of association. In Wellman's understanding then, his argument encompasses everyone, whereas Miller's argument is less inclusive. This, then, leaves Wellman with a presumptive argument in favor of closed borders, unless weightier arguments can override it. Wellman's examination of those arguments, which I reviewed earlier in this chapter in considering Miller's national identity argument, does not override Wellman's presumptive argument.

I do not find, however, Wellman's argument to be fully persuasive for two reasons. The first is that Wellman routinely appears to either conflate the ideas of self-determination and freedom of association or he readily assumes that freedom of association is constitutive of self-determination. That this is the case is not obvious. My second objection is that Wellman fails to give proper regard to the problem of disassociation for people at the state level.

In my review of Wellman's argument it is possible to note the transition of his use of freedom of association to self-determination. In the early part of his argument, in considering actions which are self-regarding, Wellman consistently uses the phrase freedom of association. Similarly, his appeal to others (e.g., White) on the subject relates to freedom of association. The context of these claims is self-regarding actions, those that have a significant impact upon the course of one's own life, even though in most cases the actions taken also affect the lives of others. It is in the consideration of the first problem in his account, the difference between individuals and states, that Wellman first introduces the concept of self-determination. By the time Wellman considers the examples of Canada and NAFTA and Slovenia and the EU, Wellman is using the terms interchangeably. Consider these two passages:

...there are at least two reasons that this inference from an individual's to a state's right to freedom of association might strike some as problematic, however. First, presumably there are morally relevant differences between individuals and groups, and these differences might explain why only individuals can have a right to self-determination.⁷⁷

If legitimate states did not enjoy a right to freedom of association – a right which entitles them to decline invitations to associate with others – then they would not be in a position to either accept or reject the terms of these regional associations...And the reason it is wrong to forcibly include these countries is because Canada's and Slovenia's rights to self-determination entitle them to associate (or not) with other countries as they see fit.⁷⁸

In the first example, Wellman uses the terms interchangeably, as if there is no difference between the two. In the second, it is plain that the freedom of association is constitutive of the right to self-determination, a position to which Wellman commits.⁷⁹ It seems reasonable in the context to assume that Wellman intends the constitutive understanding

⁷⁷ Ibid., 111.

⁷⁸ Ibid., 112.

⁷⁹ Ibid., 113, n. 5.

to the first passage as well. There is some number of rights, of which one is the freedom of association, that constitute the right of self-determination. But if this is the case, the first passage is problematic because if there are moral differences between individuals and groups then it is entirely possible that one and not the other possesses the right to self-determination. It is also possible that one has a right to self-determination or freedom to associate that is bounded. Finally, it might be that self-determination is constituted differently for individuals and groups.

Wellman readily acknowledges that a group's ability to determine its members is generally not questioned, although the manner in which it determines membership is often constrained by larger social purposes. If this is legitimate, and Wellman appears to believe it is, then one cannot simply assume that an individual's freedom of association transfers, *mutatis mutandis*, to the state. An argument needs to be provided for that claim. The argument Wellman presents is based upon the role of association in self-determination, but it is easy to conceive of arguments against the claim that the rights constitutive of self-determination are the same for both individuals and states. One such argument might claim that individuals are natural whereas states are constructed. One might argue that this difference is irrelevant but one might argue that this difference makes all the difference. If states are constructed, then they have only the rights required for fulfilling the purposes for which they are created. Even if it is granted that both groups are entitled to self-determination, it may be the case that what constitutes self-determination for each is different from how it is constituted for the other. It is this latter problem that leads to my second and more substantive objection.

States and individuals are substantially different, particularly in their ability to affect the lives of others. An individual decision to associate or not, in most cases, has a limited affect upon a person's life.⁸⁰ For most people there are adequate opportunities elsewhere to pursue or other people with whom to associate. When an individual, or a group, chooses not to associate the effects are limited. When the state makes these kinds of decisions regarding an individual, it has significantly profound and long-lasting effects. If the decision of the state is to disassociate with one of its citizens (by revoking citizenship) then the problems for that individual, in a world of states, might be insurmountable. Walzer, in his account of membership, highlights this problem:

Men and women without membership anywhere are stateless persons. That condition doesn't preclude every sort of distributive relation: markets, for example, are commonly open to all comers. But non-members are vulnerable and unprotected in the marketplace...They are cut off from the community provision of security and welfare...Statelessness is a condition of infinite danger.⁸¹

If, as Wellman maintains, the freedom of association includes the freedom of disassociation, there is good reason to deny this kind of right as part of national self-determination. In fact, that a country cannot disassociate itself from a natural born citizen is part of several international documents, including the Universal Declaration of Human Rights (UDHR) and International Convention on Civil and Political Rights (ICCPR).⁸² If the case is that states may not disassociate from their own citizens, perhaps they cannot deny association with noncitizens as well (this is one way to understand the claim of the open borders school). If the international community has determined that the right of

⁸⁰ This is not to deny that some individuals might wield such significant power and influence, that their refusal to associate with an individual or a group, has significant negative effects upon that individual or group's prospects. These circumstances are, however, significantly fewer than the more common case under consideration here.

⁸¹ Walzer, *Spheres of Justice*, 32.

⁸² UDHR, Article 15; ICCPR Article 24.

association is bounded, then Wellman must give more consideration to what these constraints are and their legitimacy.⁸³ In addition to the individual perspective, Wellman's approach to state freedom of association would appear to justify the White Australia Policy in which Australia, in pursuit of creating a pure Anglo country, denied admission to those who were not Caucasian. This policy, long abandoned by Australia, has been considered indefensible by those on both sides of the open borders debate.⁸⁴

If my analysis here is correct, then Wellman has not created the presumptive case for a state's right to control immigration by using an important principle of political liberalism. That is not to claim that it cannot be done, or that it cannot be done from the freedom of association or the right of self-determination (although Steiner's use of the freedom of association to argue for open borders casts doubt upon the possibility). My limited conclusion here is that Wellman has not provided a fully persuasive argument, leaving open the possibility of providing one. However, I believe it is highly likely that any such attempt will encounter similar difficulties in trying to ground such a significant right upon a single principle.

Conclusion

This chapter has considered the liberal arguments for the position that states have the right to control their borders. Walzer's argument, based in his proposed theory of goods, argues that all goods are social goods to which meanings are attached by the

⁸³ White bounded freedom of association, in a nonpolitical context, by utilizing a basic interests approach. Basic interests consist of integrity interests (physical security and the ability to live an authentic life) and opportunity interests (having fair access to income and other goods that have instrumental value in realizing one's ethical life). White, "Freedom of Association," 377-378.

⁸⁴ See Joseph H. Carens, "Nationalism and the Exclusion of Immigrants: Lessons from Australian Immigration Policy," in *Open Borders? Closed Societies?: The Ethical and Political Issues*, edited by Mark Gibney (Westport, CT: Greenwood Press, 1988), for the open borders disavowal and Walzer, *Spheres of Justice*, 46-48, for the closed borders disavowal.

community. The community retains the right, in fact must have the right, to control to whom these goods are distributed in order for them to retain their social meanings. Although I have rejected Cole's analysis of this argument as inadequate, I have offered a new critique that claims membership, as a gateway good, functions as a dominant good in a manner that makes membership unjust on Walzer's theory of goods. Membership, therefore, must be reconceived, most likely to be less restrictive, than Walzer claims. Miller's argument from national identity and ethical particularism in which communities give rise to more stringent ethical obligations than other relationships and permits the nation to control its membership was reviewed. Cole's analysis of this argument was also rejected, claiming that without argument Cole assumes that the position of liberal nationalism must see the community as the only source of moral obligations. Rather, it is possible to argue that the principle of humanity and the principle of community ground different types of obligations that must be reconciled or integrated. I then offered a critique of Miller claiming that it is this reconciliation and integration in which Miller's argument is found wanting. More work must be done to determine how these two principles work together. Finally, I examined the single principle argument of Wellman, based in the right of freedom of association, critiquing this argument as being inadequate because the principle of disassociation, understood from the perspective of the individual, does not transfer to the state in the manner in which Wellman envisions, because the effects of the states disassociation is fundamentally different than those of individual disassociation. The conclusion then, is that arguments for exclusive control of borders do not hold, that, while one can defend the control of national borders, this control must be

weaker than envisioned. The question to be asked, which I will take up in Chapter 5, is just how weak or strong can it be.

CHAPTER 4

NONIDEAL ARGUMENTS AND INTERNATIONAL REGIMES

In the previous two chapters I have examined theoretical, or ideal, arguments for open and closed borders. These arguments aim for theoretical consistency and coherence without regard for the actual conditions in the world or whether the end claims are achievable in the world. Problems exist in each set of arguments preventing the conclusion that either set is persuasive to those not already committed to the position. There is a further problem with these ideal approaches. While theoreticians debate about the proper understanding of borders and whether it is morally permissible to control borders from the liberal point of view, real people want to cross those borders in order to have better opportunities or to escape suffering felt in the present. They cannot wait another decade or two, or longer, for a theoretical agreement to be reached. These people want to move now.

This chapter considers two kinds of nonideal arguments that seek to resolve the problem now, creating more open borders for some, without regard for answering the question whether liberal polities are justified in controlling borders. The first approach, labeled nonideal approaches, examines how the ability to cross borders might resolve very grave problems in the world today and concludes that opening borders will alleviate that suffering. I shall look first at the nonideal argument that immigration is superior to aid as a means of assisting the impoverished in the world. Frederick Whelan's

examination of the claim that migration is preferable to aid as a means of resolving disparities in global well-being provides a useful summary for considering this claim. It remains the view most often cited in the migration literature. Shelley Wilcox offers a different approach by focusing on the problem of harm. She develops a Global Principle of Harm in which those causing harm must remediate the harm caused. Open borders is one such way to repair the damage done to poor countries (and individuals) by wealthy countries. The result of these arguments is not a claim that borders cannot justifiably be closed, but a claim that the borders should be substantially more open than they are now, and in some cases must be more open, as a matter of justice.

The second approach included in this chapter, which I have labeled international regimes, includes a strong economic rationale, focusing upon the problem of labor distribution in a globalized economy, coupled with pragmatic political concerns. Thomas Straubhaar proposes a General Agreement on the Movements of People. This agreement, patterned after other existing international agreements such as the General Agreement on Trade and Tariffs (GATT) and the General Agreement on Trade in Services (GATS), provides for the movement of labor between countries in accordance with the terms of the agreement. Bimal Ghosh, of the International Migration Organization, proposes a New International Regime for the Orderly Movements of People. This regime determines the kinds and rates of acceptable movement throughout the world, establishing a system of “regulated openness.” Both of these proposals would result in a substantial opening of state borders.

Nonideal Arguments

Since John Rawls introduced the distinction between ideal and nonideal theory philosophers have come to use these terms freely. However, the terms are often used in a manner distinct from the original understanding of Rawls and before examining the nonideal arguments associated with the open borders debate, I need to clarify how the term “nonideal” is used within the open borders debate.

Rawls split his theory into two pieces: ideal and nonideal.¹ Ideal theory focuses upon the problems of justice that occur within a setting in which people are reasonably committed to following the principles of justice. The utilization of this kind of “ideal” setting was intended to permit the clear examination and development of principles of justice which were to be achieved, if possible. Nonideal theory is the consideration of the principles of justice outside the ideal circumstances to determine how the principles should be applied when there are significant challenges to the principles, such as less extensive liberty or societies with histories that leave them burdened such that they cannot achieve justice without assistance.² Nonideal theory then considers how to work towards achievement of the principles of justice, looking for what is politically possible and recognizing that justice will most likely be achieved gradually. In the open borders debate nonideal theory is focused upon existing circumstances in the world that are perceived to be unjust in some way. Philosophers then focus upon solutions to this particular injustice rather than trying to figure out how to achieve a theoretical system

¹ The basic discussion is in *Theory of Justice*, 215-218 and 308-309. It is repeated in *Law of Peoples*, 89-91. For a useful examination of Rawls’ approach, see A. John Simmons, “Ideal and Nonideal Theory,” *Philosophy and Public Affairs*, 38(2010).

² The first example is from *Theory of Justice*, 216. The second example is from *Law of Peoples*, 106.

that completely characterizes a just society. Carens has labeled these two approaches realistic and idealistic. He writes,

The former [realistic] is especially attentive to the constraints which must be accepted if morality is to serve as an effective guide to action in the world in which we currently live. The latter [idealistic] is especially concerned with issues of fundamental justification and inclined to challenge what is in the name of what is right.³

There are two distinctions to highlight between these two usages of the term nonideal. The first is the starting point. For Rawls, nonideal theory extends or applies the ideal theory with which one starts. For the open borders debate the starting point is the obvious injustice and how to resolve it within the current context. The second distinction is what drives the solution. For Rawls, the solution is driven by the goal of making the ideal actual and maintaining theoretical consistency. For the open borders debate the solution is driven by what resolves the problem, without regard for how it fits into some wider scheme of justice or morality. With that distinction in mind, I will now turn to the two nonideal arguments under consideration here.

The Question of Aid or Immigration

The first approach from the perspective of nonideal arguments evaluates the value of immigration over the use of aid as a means of improving the status of those living in poverty throughout the world. Frederick Whelan offers a reconstruction of this argument that could be made by those who want to argue for open borders from a point of view that includes the actual circumstances in the world. Writing in the mid-1980's, Whelan characterized the state of the world as one in which many traditional concepts, including the sovereign state, citizenship, and individual freedom were not only being reexamined

³ Joseph H. Carens, "Realistic and Idealistic Approaches to the Ethics of Migration," *International Migration Review*, 30 (1996): 156.

philosophically, but were also being stretched by the actual circumstances in the world. The fundamental question Whelan examines is, “what (if any) justifications can be offered for the power universally claimed by states to exclude foreigners from their territory – especially from permanent admission – or to control and restrict alien admissions in any way they choose.”⁴ The need to answer this question rises within the liberal philosophical perspective and its concern for the equal rights of individuals. This concern leads liberals to argue for an open admissions policy in which individuals are permitted to move freely between states and take up residence in whichever state they choose. Whelan expresses concern that the vision of state required to support this view is problematic and offers justification for the state compatible with liberalism. The conclusion Whelan reaches regarding states is that it is possible to “support the moral *permissibility* of exclusion in principle.”⁵ The reasons that support exclusion “also constitute objections to the view that states...are morally required to be open to the entry of foreigners.”⁶

Whelan understands the objection to state control over borders as originating in two schools of thought. The first is abstract liberalism of the kind associated with John Rawls. Examining the two principles of justice (three, if one separates out the difference principle as Whelan does), Whelan asserts the plausibility of Rawlsian support for open borders of the sort asserted by Beitz,⁷ as either an expression of the rights of individuals or as an issue of distributive justice. I examined this argument in Chapter 2 and will not consider Whelan’s version of it here. The other strand of liberal thought is the nonideal

⁴ Whelan, “Citizenship and Freedom of Movement, 3–4.

⁵ Ibid., 4.

⁶ Ibid.

⁷ Beitz, *Political Theory and International Relations*. Beitz’s position is later rejected by Rawls in *Law of Peoples*.

thread initiated by Singer in his 1971 article, "Famine, Affluence and Morality."⁸ This utilitarian argument claims that those in affluent countries have an obligation to relieve the suffering of those less fortunate in the world if it can be done without sacrificing something of comparative moral value. Since the only thing of comparative moral value to a life is a life, the obligation to aid the poor in the world is a very strong obligation. This argument has been made in various forms both for individual and for state obligations to aid. In this discussion migration becomes a possibility as simply a variant of the normal aid scenario: rather than bring the resources to the people, the people are moved to the resources. The effect is the same: those who are in extraordinarily unfortunate circumstances find their lot in the world extremely improved.

Whelan's summation of the argument consists of five observations that make migration preferable to aid.⁹ First, the need for aid is created by the current distress of people but international aid runs into significant problems because of state to state problems. State to state aid is inefficient and subject to the not insignificant problem of corruption and waste. Anything that reduces this problem is beneficial and should be preferred to state to state aid. Second, migration is preferable to aid as the only means by which refugees can be helped. A person's status as a refugee is an indication that the state is no longer a possibility as a channel for aid. Either there is no functioning state, or actual conditions prevent the state from providing aid or the refugee might be part of some oppressed or persecuted group within the state. In such circumstances state to state

⁸ Peter Singer, "Famine, Affluence and Morality," *Philosophy and Public Affairs*, 1(1971). For a less demanding but similar approach, see Pogge, "A Global Resources Dividend."

⁹ Arguments against foreign aid are plentiful, both with and without migration as an option. For a recent critique of aid see Roger C. Riddell, *Does Foreign Aid Really Work?* (Oxford: Oxford University Press, 2007). For a recent argument for migration over aid see Reginald M. Williams, "Combating Long-Term Global Poverty: A Thought Piece," *Poverty and Public Policy* 3, 8 (2011).

aid is not able to resolve this person's need. Aid must come from elsewhere and bringing the person to the aid has many advantages. Third, migration solves problems of needs without creating unknown impacts upon the international system of goods. Those who focus upon the problem as simply one of the distribution of goods fail to recognize that when the principles of distribution change, so the system of production also changes because the incentives to produce have changed. The presence of free goods through aid undermines the incentive to produce those goods locally and thereby undermines the position of the local resident, including those who do not require aid. Migration leaves intact the system of production and consumption, although moving people to different places within the system changes the levels of production and consumption in any local circumstance. These local changes must be accommodated, but they do not undermine the economic system in the manner that free goods through external aid does. If, however, this movement is considered solely from the perspective of moving labor to where it is needed, this not only doesn't change the economic system of production and consumption, it improves it by moving labor from where it is not needed to where it is needed. Fourth, aid, especially personal aid, faces significant problems in the burden it places upon individuals. Consider Singer's argument in which one should contribute to aid those who are suffering to the point of one's own marginal utility, without regard for whether others are helping or not.¹⁰ Migration, because it takes people to a new community, enables the creation of a cooperative response in which all members of the community can participate, minimizing the impact upon any particular individual. Finally, migration, if accompanied by unrestricted movement, increases the presence of freedom in the world and when conceived as a negative right places little burden upon

¹⁰ Singer, "Famine, Affluence and Morality," 234.

individuals or states because all that is required of them is to not interfere. Increasing the presence of freedom in the world is desirable from the liberal point of view. Hence, immigration can be understood as preferable to aid as a means of relieving the very real suffering in the world.

The conclusion of the nonideal argument is that migration is preferable to aid because it promotes equality, creates a more just distribution of goods in the world and relieves extreme hardships for people. Williams neatly sums up the heart of the argument with less sophistication than Whelan:

Rather than spending billions of dollars establishing infrastructure in poor, undeveloped regions, this money would seem better spent on relocating the world's severely poor to regions with the developed infrastructure they need to overcome poverty in the long run, and on expanding this infrastructure so it can accommodate the influx of people. For it is less expensive to expand existing infrastructures than to establish it anew.¹¹

What troubles Whelan about this argument is that it is divorced from the realities of political life.¹² It is the realities of political life that create a problem for Whelan. How is it possible that liberal philosophy can be so clear regarding morally permissible actions that run counter to the positions of most people in the world? Both states and common opinion in the world continue, through many different avenues, to support the principle of state sovereignty and the accompanying control of borders without regard to a nation's wealth or poverty, political system or standing in the international system of states. This circumstance leads Whelan to call the philosophical conclusions of liberalism regarding migration "paradoxical"¹³ because they run counter to overwhelming common opinion. If all varieties of states are committed to the system of states and the sovereignty that it

¹¹ Williams, "Combating Long-Term Global Poverty," 5.

¹² Whelan, "Citizenship and Freedom of Movement," 14.

¹³ Ibid., 15.

accords to them, Whelan thinks we should be hesitant to accept so quickly the conclusions of the liberal view. Perhaps there are relevant factors to consider that have been missed.

One of those factors is that in the context of the argument for migration over aid it is routinely assumed that migration is always from poor to wealthy states. But it is also possible that movement will occur between poor states, in the case where both states are poor, but the discrepancy in poverty is adequate to induce movement between neighboring poor states.¹⁴ Borders also provide a sense of protection in a world still mindful of aggression by states seeking more room for their own populations.¹⁵ Although these reservations about the argument are not alone adequate to reject the argument for immigration over aid, they do raise significant questions about its viability in a world of states. When coupled with the defense of states from the perspective of the value of states in people's lives (states enable self-determination, cultural and economic variability, the realization of a robust understanding of civil rights),¹⁶ immigration over aid, Whelan argues, appears to be an unacceptable argument for the case of open borders from a nonideal perspective.

More, however, should be said about the claim that migration should be encouraged over aid. Whelan's response is a moral response. It seems that if the concern is to improve the plight of real people in the world that there should be an empirical question to answer. Either immigration does or does not, improve the situation of the

¹⁴ Ibid., 15.

¹⁵ Whelan has in mind the German and Japanese aggression during the Second World War. Whelan writes in a time of comparative security from terrorism. Undoubtedly, today he would add security from nonstate actors as well.

¹⁶ Whelan engages in an extensive discussion regarding the value of states. Ibid., 16-34.

people in the world that are the focus of nonideal theory. It turns out that that question is harder to answer than one might think.

The problem of empirically determining the effectiveness of immigration over aid turns on our ability to evaluate the effectiveness of both. Evaluating the effectiveness of aid is complex. Hassoun, in a recent article, claims that the evaluation must occur on two levels: a macro-level and a micro-level. The macro-level provides data about the effectiveness of aid across regions or whole countries, typically by evaluating measures such as growth in GDP and similar aggregate measures. The problem with macro-level measures is that they don't really provide any insight into the effects of economic growth on impoverished people. Economic growth occurs, but may be concentrated in ways such that the poor receive few, if any, of the benefits. Hassoun writes:

...the evidence about aid's impact on growth cannot tell us what impact aid has on the global poor. Even if aid increases growth, it may not reduce poverty. Growth can increase even as the poor become poorer, so long as the rich or middle class gain more than the poor lose. Furthermore, different causes of growth affect the poor differently.¹⁷

Aggregate measures are therefore inadequate to answer the empirical question of whether aid improves the plight of the poor. But even the interpretation of macro-level data becomes controversial. The World Bank, in its *Assessing Aid* report, advocates aid for countries with good economic policies¹⁸ because these good policies ensure that the aid will be as effective as possible, that is, create the greatest economic growth. However, the report is not without controversy even though the World Bank continues to stand by

¹⁷ Nicole Hassoun, "Empirical Evidence and the Case for Foreign Aid," *Public Affairs Quarterly* 24(2010): 2.

¹⁸ Good economic policies are the ten economic practices that have become known as the "Washington Consensus." See John Williamson, "A Short History of the Washington Consensus" (paper presented at the conference "From the Washington Consensus Towards a New Global Governance" organized by Forum Barcelona 2004, Barcelona, Spain, September 24–25, 2004).

its conclusions. These critiques include concerns that growth is not the only measure of aid effectiveness, disagreement regarding what constitutes good policies and the kind of data issues that Hassoun is concerned with at the micro-level.¹⁹

Micro-level assessment seeks to determine if particular aid programs affect the impoverished in positive ways. Two problems occur in this assessment. The first is the type of assessment being conducted. Often the case both for and against aid utilizes what Hassoun calls nonexperimental or quasi-experimental methods. Anecdotal evidence, the stories people tell of effective or ineffective aid, form the nonexperimental category. Quasi-experimental aid programs do not use random selection methods and therefore, run the risk of selection bias in picking program participants because the researcher may influence who participates and how they are assigned to aid programs. These two methods of assessment are utilized in the majority of empirical studies regarding aid, raising questions about the validity of the empirical data we have about aid programs. The second problem is determining what standard of poverty to use for measuring whether the aid is effective or not. Although there are defined standards, such as Purchasing Power Parity (PPP) or the Human Development Index (HDI), the validity of these standards have been questioned for a wide variety of reasons. If these standards do not appropriately or accurately measure the poverty status of people because they measure the wrong attributes or measure them incorrectly, then any assessment of the effectiveness of aid will be incorrect. The bottom line of Hassoun's argument is that the kind of data we want, experimental data with a high degree of internal validity, is not

¹⁹ For example, in response to the 1998 Assessing Aid report, see Robert Lensik and Howard White, "Aid Allocation, Poverty Reduction and the *Assessing Aid* Report," *Journal of International Development*, 12(2000): 399-412. For a broader critique of this policy outside the World Bank Assessing Aid reports, see Henrik Hansen and Finn Tarp, "Aid Effectiveness Disputed," *Journal of International Development*, 12(2000): 375-398.

widely available to assess the value of aid. Hassoun argues that what data there is that can be classed as truly experimental with high levels of data validity, indicates that aid does at least some good and that, “[e]ven if aid is generally a bad idea, we should not neglect the good we can do for some, even if we cannot completely ameliorate poverty.”²⁰ Hassoun’s conclusion is that aid is useful in at least some cases, especially to those individuals who receive it. If aid is useful, how do we compare it to immigration?

There is no doubt that for those in dire circumstances who are able to move that it is possible to improve the quality of their lives, for at least some of those who move. But how does this possibility fare as a policy solution to poverty? Pogge has argued that it doesn’t fare well at all, and while Pogge supports the idea that wealthy countries should open their doors to admit more poor people, he believes that pursuing this as a significant policy objective is not useful. The central problem is that the number of people in poverty who could benefit from migration is so large that it dwarfs the number of people receiving countries could receive under optimal conditions. Pogge writes:

...the number of desperate foreigners whom the rich countries now admit every year, and also the larger number of desperate foreigners they might conceivably come to admit under the best of circumstances – these numbers are ridiculously small in comparison to the number of those who are in desperate need and would like to come.²¹

But the fact that for every person helped by movement there will be thousands left behind is not the only problem. Those people whom the rich countries will admit are not the ones who are most in need of moving. They are, in many cases, educated and privileged in their home countries such that “the truly worst-off always compete at a great

²⁰ Hassoun, “Empirical Evidence,” 11.

²¹ Thomas Pogge, “Migration and Poverty,” in *Citizenship and Exclusion*, edited by Veit Bader, (New York: St. Martin’s Press, 1997), 13.

disadvantage against more privileged persons from the poor countries.”²² Given these circumstances, Pogge argues that people motivated by the deplorable circumstance of the poor around the world should advocate for aid over migration as a means to provide both short and long term relief.

The nonideal argument that aid is ineffective and should be abandoned in favor of a greater rate of immigration is found wanting by Whelan, Hassoun and Pogge. Immigration levels could never rise to the level needed to eliminate, or even ameliorate, the problem of global poverty. It is difficult to claim that borders should be more open as a means of significantly reducing suffering in the world.

Wilcox and the Global Principle of Harm

The debates about the relation between individual and state cannot hide that around the world many people live in extreme poverty, a poverty that is often aggravated and sometimes (or largely) caused by the policies of states. Shelley Wilcox, in her “Immigrant Admissions and Global Relations of Harm,”²³ argues that immigration is one avenue for ameliorating some of these problems. Wilcox is sympathetic with the cosmopolitan ideals represented in the work of Carens. However, she recognizes that Carens’ ideal approach is problematic, particularly in its freedom of movement formulation. Chief among its problems is that it provides inadequate normative guidance for immigration policies that must provide guidance for choosing from among prospective immigrants when not all can be admitted.²⁴ Cosmopolitan arguments, such

²² Ibid., 14.

²³ Shelley Wilcox, “Immigrant Admissions and Global Relations of Harm,” *Journal of Social Philosophy*, 28 (2007): 274-291.

²⁴ Ibid., 274. See Carens, “Realist and Idealistic Approaches,” for a discussion of the balance between ideal and nonideal approaches to this problem and Joseph H. Carens, “Who Should Get In? The Ethics of

as that of Carens, typically acknowledge that at least under some conditions border controls are justified. The existence of such conditions indicates the need for justified principles for determining the priority of conflicting immigration demands in the nonideal world.²⁵ Carens provides no principles useful for resolving these kinds of conflicts. A further problem with the arguments of Carens is that the appeal to the freedom of movement cannot establish priorities between prospective immigrants because it claims the right to immigrate as a universal right in which there is no priority of claims and ignores the possibility that there might be other grounds, such as immediate threat to life, upon which people claim the right to immigrate. In the case that at least some restrictions on immigration may be justified, the question of who should justifiably have priority becomes a relevant question. In light of these deficiencies, Wilcox develops an argument, compatible with but not dependent upon, the cosmopolitan arguments of Carens, that “develops a new principle for establishing immigrant admissions priorities in the nonideal world.”²⁶ Wilcox argues for an extension of the Harm Principle, which she calls the Global Harm Principle (GHP), in which states have duties to admit particular immigrants that are lexically prior to establishing admissions related immigration policies that reflect the interests of their own citizens.

The Harm Principle is universally accepted as guidance for identifying duties and obligations related to liberty in liberalism. Wilcox understands the Harm Principle as consisting of a primary duty and two derivative duties.²⁷ The primary duty is to refrain

Immigration Admissions,” *Ethics and International Affairs*, 17 (2003): 95-110, for a consideration of how Carens applies his arguments to nonideal circumstances.

²⁵ I will use nonideal here in summarizing Wilcox’s work as that is the term she uses consistently. It is equivalent to the real world, consistent with usage of the term within the open borders debate.

²⁶ Wilcox, “Global Relations of Harm,” 274.

²⁷ *Ibid.*, 277.

from harming others by any means. The derivative duties are that in the case that harm is or has occurred, the perpetrator has the additional duties to cease the harmful actions and provide compensation to the victim. A straightforward extension of this principle, to both states and the world, results in the claim that states should not harm noncitizens and when they do they must cease those actions and provide compensation.²⁸ Liberal egalitarian commitments mean that these duties apply to both citizen and noncitizen alike. The state is not permitted to ignore the effects of its actions just because those affected are not citizens.

Understanding what constitutes harm in a multicultural context poses challenges. Therefore, harm must meet two criteria to be acceptable in this context. It must be substantive enough so as to prevent harms to individuals but not so substantive as to prevent states from fulfilling their functions out of fear of harming others (since policies affect individuals differently). It must also utilize an understanding of human welfare that is compatible with a wide variety of understandings of human flourishing. An understanding of harm that meets these two criteria will be acceptable in a diverse international community. Building upon Joel Feinberg's conceptualization of harm as a setback to interests,²⁹ Wilcox claims that a state harms an individual when it engages in conduct or establishes policies that result in a human rights deficit for individuals.³⁰ The focus upon human rights as the focus of human interests aims at utilizing a widely

²⁸ Wilcox actually writes about "societies" rather than "states," and "foreigners" rather than "noncitizens," using the more standard state and noncitizen language on occasion. It is unclear whether Wilcox intends to draw some distinction between society and state or between foreigner and noncitizen. I have utilized the more common state and noncitizen terminology in summarizing and assessing the argument. It is unclear to me that societies, which may or may not be contiguous with states, can be obligated or obligate in the manner required by Wilcox.

²⁹ Joel Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984), 31-45.

³⁰ Although Wilcox limits this condition as valid for the purposes of her GHP, it is unclear from her text whether this is intended as a necessary or sufficient condition. It is at least sufficient, but since the GHP is acknowledged as being one principle among several, it is unlikely that it is a necessary condition.

acceptable standard of harm, one that focuses upon basic welfare interests rather than upon “aspirational” interests that are attached to particular individuals. This approach is in contrast to much of the open borders work where the examples cited as motivations for movement are often aspirational, such as marriage or to enjoy particular cultural activities. The use of deficit rather than violation captures the idea that some actions create contexts where the achievement of human rights is not possible and it is these circumstances with which we should be concerned.

Having identified what counts as harm Wilcox must undertake a second and more difficult task. How do states actually harm individuals in ways that would invoke her Global Harm Principle? Wilcox’s approach identifies five general conditions, which, when met, indicate that a state has, or is currently, engaged in harmful conduct. The state is then collectively responsible for any human rights deficit that results from that action. The first two conditions set the criteria for causal responsibility, the next two prevent the standard of causal responsibility from becoming unacceptably demanding, and the final condition sets the claim of collective responsibility. These conditions, where A and B represent autonomous ethical agents belonging to different states, are:

1. A’s conduct is *causally relevant* to the production of B’s human rights deficit.
2. A’s conduct is a *critically necessary causal factor* in the production of B’s human rights deficit.
3. A could reasonably avoid producing B’s human rights deficit in the sense that alternative conduct would not produce comparable harm.
4. A’s conduct foreseeably gives rise to B’s human rights deficit.
5. The members of a society (Society C) are collectively responsible for A’s conduct.³¹

³¹ Wilcox, “Global Relations of Harm,” 279-280.

These conditions do several things. The emphasis upon a “critically necessary causal factor” in the second condition eliminates the failure to mitigate existing human rights deficits as a case of harm subject to the GHP. Countries cannot be held responsible for existing harm just because it did nothing to eliminate harm that it did not cause. For the GHP to be relevant the deficit must be directly caused by A’s action. Further, the conditions are intended to distinguish between culpability, which is attributed to A, and accountability, which is attributed to C. The actions of A directly caused the harm but C (the members of society who did not commit the action, although A is included because A is a member of C) is responsible for compensating B or removing the deficit. C’s responsibility represents a form of “collective vicarious responsibility” that can apply to individuals (e.g., parents and children, where parents are responsible for the actions of their minor children) or to groups of people such as democratically elected governments. Office holders represent voters and act in their name; therefore, citizens in democracies become collectively responsible for the actions of those office holders.³² In some manner, most likely through government action that remediates or compensates B, the members of society C must eliminate the harm that A has caused.

The problem of ameliorating the deficit is contextual; different circumstances will require different actions to make the affected whole. However, the state is required to desist from its actions causing the deficit and to set the circumstances right, understood on the legal principle of *status quo ante* (the way things were before the state’s harmful actions). Wilcox argues that in some cases the most effective action will be admission of the harmed individual as an immigrant, and in cases where admission is the only possible remedial action, it will be mandatory. The effect of Wilcox’s GHP is to reorder national

³² Ibid., 281.

immigration policies to favor affected people over nonaffected people who also wish to immigrate, in those cases where limits on immigration are justified.

Wilcox recognizes the limits of her GHP, admitting that it is but one of several normative principles required as part of a just liberal immigration policy. At first glance, it appears that those eligible for priority admission under Wilcox's proposal are also entitled to mutual aid (aid based upon their humanity rather than their membership in a community and therefore, extended to nonmembers) as envisioned by Walzer and Miller. However, the claim that their entitlement to priority is due to direct harm it creates the situation where the obligation is stronger than that of mutual aid.

Wilcox's proposal takes the open borders debate in new directions in that her argument is intended to be compatible with principles reached through ideal considerations, but applicable to the nonideal conditions of the world. But her argument is troubling in many ways. It is not at all clear that the relationships of A, B and C are adequate to engender the kind of collective responsibility that Wilcox calls for. The relationship between A and C is overly broad and inadequately specified. Why should the actions of A, a citizen of some country, which result in some kind of human rights deficit for an individual, obligate A's legal compatriots. Suppose A is an ex-patriot living abroad who has effectively terminated all but the legal relationship to his native country. A then engages in some action that systematically creates a human rights deficit for people in the country in which A lives. The link between A and C is tenuous and it is unclear why members of C should be obligated to make amends for A's actions. Or, why should actions committed by A, while travelling in a foreign country, obligate A's compatriots to compensation. The actions of an autonomous agent should not obligate

others to compensate those harmed without a stronger relationship between A and A's compatriots. Wilcox might be able to respond here that A must be acting on behalf of, or as an agent of, a particular country in committing the offending actions. The examples used by Wilcox, Agent Orange defoliation and the My Lai Massacre from the Vietnam War, are situations in which the government or agents of the government are involved. In these cases, collective responsibility seems appropriate and if she intends to limit the application to cases such as these, her definition of A must be made more explicit. In cases where an agent acts independently, however, it would be more appropriate to treat the incident as a criminal action with appropriate individual punishment of either a criminal or civil nature.

Further, it seems unlikely that a single actor can create the conditions in which human rights deficits occur. Human rights deficits of the kind Wilcox is concerned with are systemic, caused by large events such as natural disasters, drought and war, or by the inadequacy of social institutions, be they economic or governmental, to provide an adequate baseline to achieve the welfare interests associated with human rights. It is the joint action of people, typically acting as governments or other kinds of institutions (nongovernmental organizations (NGOs), international financial institutions such as the International Monetary Fund and the World Bank and corporations), that create the systems resulting in widespread human rights deficits. These actions typically result in policies affecting social institutions. Wilcox's appeal to the work of Thomas Pogge is appropriate for these kinds of circumstances, but not for many circumstances that meet her criteria. Wilcox recognizes that some conditions (e.g., natural disasters, family

separation) will not have a direct causal agent and therefore, fall outside the scope of her GHP. Additional principles will be required for these circumstances.

The requirement that B must be a foreigner, defined as “non-citizens who have not been granted legal permanent residency status,”³³ is in conflict with the liberal egalitarian principles Wilcox intends to support. If her intent is to apply this only to foreigners, her principles leave open the possibility of permitting harming actions against citizens that result in human rights deficits for those citizens. Environmental degradation that affects foreigners counts, but the same activities in which the effects are confined within national borders would be permitted. A state could imprison its own citizens in ways they could not imprison foreign citizens. This is certainly not the intent of Wilcox, but it demonstrates the difficulty of constructing principles intended to give priority to individuals of one group over those in other groups. These principles appear to make illiberal distinctions between those in need, and will be inadequate to create priorities down to the individual level in the event that all those with human rights deficits cannot be admitted to another country. It is unclear, therefore, what a GHP gains us in the pursuit of a more just world.

Finally, as her proposal provides just one principle among many required, it is an incomplete proposal that cannot be fully assessed. Wilcox indicates that at minimum principles regarding the distribution of migrants among liberal states when admission is for humanitarian reasons rather than reasons of harm, family reunification and immigrant integration are required. Without some indication of what these might be and what additional principles are required, it is possible that her GHP might be modified or constrained in significant ways by these other principles. For example, the GHP is

³³ Ibid., 277.

intended to prioritize admissions for those suffering human rights deficits over voluntary economic admissions. But who receives priority in the case in which candidate immigrants are suffering rights deficits, some from agent caused actions and others from natural causes such as earthquakes or drought. Who receives priority? If priority is given to those suffering from natural forces induced deficits over those suffering from agent induced deficits, in the circumstances of limited admissions, it is possible that agent caused deficits will never be addressed. While in many cases unlimited admissions are a possibility, in others it will not be possible. In order to argue for mandatory admissions in some cases Wilcox must have a more robust view of the principles that control such obligations. Further, debates over direct causal harm, which take place in political rather than philosophical discussions, are likely to be extensive and end in circumstances in which very few individuals are admitted because no state will admit culpability and there is no adequately empowered global agency to determine culpability. This circumstance would leave immigration policies significantly intact, a problem unsatisfactory to the liberal egalitarian. Without something close to the set of principles that Wilcox would consider complete, it is not possible to identify what conflicts might exist between principles and how those conflicts might be resolved or fully assess the impact of the principles upon immigration policies.

The proposed Global Principle of Harm attempts to specify conditions under which a state would be required to admit immigrants, regardless of its existing policy. Although the idea that global institutions can harm people is well established, identifying the conditions under which particular agents, be they individuals, government or other institutions may be held culpable for the effects of those institutions is not nearly as clear.

Wilcox's proposal is too broad in the relation of causal agent to accountable society and requires clarification. The scope of application also needs clarification so as to not support domestic actions not permitted internationally. Like many of the arguments related to open borders,, Wilcox's proposal brings valuable issues to light but needs additional work to fully assess its value in a comprehensive scheme of immigration control.

International Regimes

International regimes are ways of institutionalizing behavior in the international arena. The term was originated in 1975 by John Ruggie³⁴ and became a central focus of the field of international relations during the 1980s as a way of understanding international organization. Although there are a variety of ways in which to define international regimes, the standard definition of an international regime is "sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations."³⁵ The most expansive definition claims there is a regime behind any kind of patterned behavior because patterned behavior necessarily results from principles, norms and rules.³⁶ In this case, regimes exist but may not always be identified. The most restrictive definition claims that international regimes only exist when specific multilateral agreements have been signed and ratified by states. These agreements explicitly define permissible and impermissible actions within some particular sphere of behavior, typically with some

³⁴ John Gerard Ruggie, "International Responses to Technology: Concepts and Trends," *International Organization* 29(1975): 570-571.

³⁵ Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," *International Organization*, 26 (1982): 187.

³⁶ Donald Puchala and Raymond Hopkins, "International Regimes: Lessons from Inductive Analysis," *International Organization*, 26 (1982): 557.

kind of injunction for violation.³⁷ International regimes then are like social structures; ways of doing things between states that may or may not have explicit rules written for them and may or may not create international organizations to manage the regime. Common examples of international regimes are the Bretton Woods System related to monetary systems, the Kyoto Protocol for controlling environmental change, and the General Agreement on Tariffs and Trade controlling international trade. Although all of these represent explicit regimes, theoretically, a regime may be implicit. Whether the principles and norms of international regimes are made explicit is often the result of competitive advantage gained by leaving them either implicit or explicit.³⁸

In this section of the dissertation I will examine two proposed international regimes related to migration. Although not directly philosophical in nature they are important because they represent the kind of international agreement related to migration that might reasonably be expected to be reached. The two regimes are economically motivated but recognize the political ramifications of such movement. I will review the proposal and assess them from the perspective of the commitments of liberalism.

The Global Agreement on the Movements of People

Unlike all of the previous arguments examined thus far, Thomas Straubhaar's argument for a General Agreement on the Movements of People (GAMP) is not intended to be primarily a moral argument. However, it has moral aspects and the proposal as presented would serve to eliminate some of the practical problems faced by states and

³⁷ This definition is a consolidation of several related approaches by Stephen Haggard and Beth A. Simmons, "Theories of International Regimes," *International Organization*, 41 (1987): 495.

³⁸ For an example, see the discussion regarding the development of international regimes regarding space exploration in M.J. Peterson, *International Regimes for the Final Frontier* (Albany, NY: State University of New York Press, 2005), 1-14.

reduce the urgency of the problem of borders as understood by liberal political philosophers, especially those working from a nonideal perspective. The context that drives the concerns of Straubhaar is economic globalization. Economic problems that have traditionally been understood as national problems are becoming international in character and therefore require international solutions. Trade is no longer local in character. Goods are exchanged between different countries in ways never before realized. Historically, according to Straubhaar, nations have been efficient at minimizing costs related to economic development with the resulting benefits accruing to the nation. That is no longer the case as large countries break up into smaller countries; countries organize themselves into local trading regions while others organize themselves into larger units, both political and economic. This changing game requires a new set of laws to guide this new kind of trade. In Straubhaar's words: "*global games need global rules*. The era of globalization calls for an international framework to regulate international movement of people efficiently."³⁹ Developed independently of, but included as part of the larger New International Regime for the Orderly Movements of People (NIROMP) project discussed below, Straubhaar proposes the development of the GAMP, patterned after other similar international agreements such as the General Agreement on Trades and Tariffs (GATT) and the General Agreement on Trade in Services (GATS),⁴⁰ as a means toward making the international movement of people "more orderly, manageable, and

³⁹ Thomas Straubhaar, "Why do we Need a General Agreement on Movements of People (GAMP)?," in *Managing Migration: Time for a New International Regime?*, edited by Bimal Ghosh (Oxford: Oxford University Press, 2000), 111.

⁴⁰ Straubhaar also indicates that his proposal has affinities with the "GATT for International Direct Investment" proposed by Thomas Kindleberger, *Multinational Excursions* (Cambridge, MA: MIT Press, 1984). This proposal has never been implemented. Straubhaar, "General Agreement," 130.

efficient for both sending and receiving countries.”⁴¹ The argument appeals to both theoretical and empirical considerations.

The effects of globalization driving economic changes have also had an impact on the movement of people. The strength of Straubhaar’s argument lies in his economic analysis of migration. Three factors are of importance here: changes in global infrastructure, a little understood preference for not moving (Straubhaar refers to this as “immobility”), and the self-regulated dynamic created by the first two factors. In the last 50 years the economic factors in the cost of production have dropped dramatically, principally transportation and communication costs. In a world in which one can communicate instantly with those around the world and meet face to face in a matter of hours, businesses face not only a world of new possibilities but a world in which business can do more and spend less. The advances in transportation and communication affect people as well, making it cheaper and easier for people to move around the world and stay in contact with those left behind. The result is the beginnings of a global, rather than a local, labor market. The effects of the global labor market are experienced differently by different classes of workers. Unskilled labor is affected directly by competition with unskilled foreign workers and indirectly by the import of goods now manufactured elsewhere because shipping costs are less than the labor savings. Highly skilled workers, on the other hand, are able to search for the best return on the investment they have made in their skills. Global demand for these skills outpaces the supply, enabling these workers to often find better work options away from home. Despite these beneficial effects, global movement in labor is restricted both by the rules of national sovereignty and by a preference for immobility.

⁴¹ Straubhaar, “General Agreement, 111.

A large majority of workers, despite the ability to market their skills elsewhere in the world, tend to stay in their home country, often in the same locales. Although poorly understood from an economic viewpoint, Straubhaar believes that this preference for immobility is driven by what he calls “location specific insider advantages.”⁴² People have advantages from their knowledge of locales. This may be sociological factors such as language, culture and knowledge of local social structures, but it may also be personal connections. People are tied to other people. If the skills that provide these advantages are not readily transferable (e.g., the skills of an Aboriginal person in Australia aimed at surviving under harsh living conditions are of little use in urban environments) and are not compensated for by other skills, the worker will stay put even when significant disparities in prosperity between regions exist. This factor also explains why most worker movement is local rather than global, between regions with similar characteristics rather than between regions with disparate characteristics.

These two factors, changes in the global infrastructure and the preference for immobility, have led to cross border employment in which there are larger numbers of temporary workers, often motivated by seasonal work, an increase in service related workers such as managers and entertainment personnel and intrafirm transfers of existing staff. Permanent movement is characterized by chain migration, in which migrants follow earlier migrants to the same location, because some of the location specific insider skills advantages (language, culture, and personal connections) retain their benefit, and for humanitarian reasons such as family reunification or asylum. Irregular migration, a growing problem around the world, is both temporary and permanent. Neither the “labor market-driven demand-determined” character of the temporary labor movement nor the

⁴² Straubhaar, “General Agreement,” 115.

supply-driven character of the permanent labor movement is subject to national policies and controls. Each of these features falls outside the boundaries of state control. The current patterns of movement then, create a “self-feeding self-enforcing dynamic” that is uncontrolled. However, states have an interest in controlling this movement and of necessity, must respond to it. These two desires, historically fulfilled through national immigration policies, can now only be fulfilled through an international regime.

The conceptualization of this international regime proposed by Straubhaar draws on the economic understanding of voluntary associations such as clubs.⁴³ Nations should be viewed as clubs in which citizenship is the equivalent to club membership. Club membership is a thoroughly economic proposition rather than one fraught with claims of identity or the social meanings of goods. If the benefits of the new club member outweighs the disadvantages, then the member is admitted. In Straubhaar’s words: “The ‘golden rule’ is that new members should be allowed to enter and stay if their marginal contribution to the financing of the club goods (fees, positive external effects) is larger than their marginal (congestion) costs for the old members.”⁴⁴ On this model all that is necessary is to evaluate contributions and costs to the club of the prospective member. As long as the net value is positive, one can be admitted. This model helps to also understand the resistance to migration. Both old and new members compete for common club goods. If the perception is that new members will result in a decrease in the common club goods available to existing members, or that their contributions to the club will increase in order to keep the quantity of goods available constant, then new members will be resistant to new members. Similarly, members will be desirous of having new

⁴³ The use of clubs here should not be confused with that of Walzer. It draws on the work of James M. Buchanan, “The Economic Theory of Clubs,” *Economica* 32(1965).

⁴⁴ Straubhaar, “General Agreement,” 126.

members whose contribution to the club will exceed their consumption of club goods. The perception of the benefit or cost of new club members is the same as the perception of citizens regarding immigrants and determines whether the new club members (or immigrants) are welcome. If the contributions of immigrants are positive and their affect upon congestion is minimal, immigrants are to be welcomed in the country. In a similar manner, the club analogy works for sending countries, which appear like clubs that are glad to be rid of members who utilize more club goods than they contribute. Countries should be glad to be rid of those citizens who require more state support than they contribute.

Unfortunately, the current international model based upon this club understanding has significant negative effects which Straubhaar treats as external hazards or negative externalities. Most significantly they lead to quite divergent development paths in which some countries become very prosperous and others remain poor. Further, they lead to “*suboptimal* human capital production.”⁴⁵ National clubs (nations) will hesitate to invest in workers if they fear the workers will leave for more attractive countries. Finally, national policies will seek to implement the preferences of the country (understood as a club), keeping out those who represent a net demand on the goods of the club. But given the changes in global infrastructure, these restrictive policies are bound to fail, creating an undesirable difference between policy and outcome. Properly understood, the economics of migration and its affect upon national interests lead to the conclusion that

the inefficiency and inefficacy of national migration policies has made it clear that an independent procedure by single nation states is no longer adequate...What is needed is a transnational framework to balance the basic allocation benefits of free international migration with the

⁴⁵ Ibid., 128.

controversial distribution and external effects of cross-border movements.⁴⁶

Labor should be viewed as a commodity to be allocated by the market. Just as international monetary schemes are supportive of the free movement of capital, so there should be an international labor scheme to support the free movement of laborers. With this understanding, Straubhaar proceeds to make concrete recommendations on what principles an international regime should include.

The theoretical commitments of neoclassical economics leads to the conclusion that in most cases the free movement of labor results in positive benefits for both the sending and receiving countries. However, the absolute free movement of labor can also result in negative effects, such as the brain drain and crowding out or congestion effects. The international agreement then, must focus upon the conditions that lead to these negative effects by controlling for externalities and market failures. Although intended to control for the negative economic effects of cross-border movement, the proposed GAMP contains both economic and political proposals. This is necessary because of traditional views of national sovereignty and because it is national governments who sign international agreements.

The economic proposals aim at two goals: the internalization of the external effects of movement and the optimal allocation of public goods on an international scale. Both goals can be achieved, claims Straubhaar, through the establishment of a migration tax, which consists of both an “exit tax” and an “entrance fee.” The idea is that exit charges are set so as to discourage brain drain effects, whereas the entrance fees are set to compensate those affected by the crowding out effect. Although Straubhaar uses mixed

⁴⁶ Ibid., 129.

terminology as to taxes and fees, he emphasizes that these are really fees because they don't provide general fiscal revenues but are intended solely to offset (or internalize) the effects, both positive and negative, of cross-border movement. The costs of international migration are borne by those who cause the effects rather than by those who are affected by the movement. This proposal, which is not original with Straubhaar,⁴⁷ will make migration expensive and might serve to minimize the amount of migration around the world.

There is, outside Straubhaar's primary discussion of the economic proposals, a second taxation proposal. Straubhaar proposes that national taxation schemes, which are currently based upon residency only, be based upon residency and citizenship. A Nigerian citizen working in the United States under current law pays taxes only in the United States. Such a citizen should pay taxes (as appropriate) to both his resident nation and his nation of citizenship. The purpose of this additional, regular tax is to create a sense of loyalty to one's country of origin since one always retains the right of return. It also can be understood as an "insurance fee," compensating those left behind for their compatriot's risky behavior. This will increase the total tax burden to the worker, but is intended to make sending nations more open to emigration, especially that of highly skilled workers. The home country will continue to benefit from the training invested in these workers whether those workers work in their home country or abroad.

The political proposals are vague, but aim at discouraging governance practices that create the circumstances of mass migration. Two principles are proposed. The first establishes that all people may stay in their home country, including the right to return

⁴⁷ See Jagdish Bagwhati and J.D. Wilson, *Income Taxation and International Mobility* (Cambridge, MA: MIT Press, 1989) and Straubhaar's summary, "General Agreement," 132.

home. This principle is already widely recognized in human rights documents. The second principle holds countries accountable for “bad” governance, which is identified solely as that which results in mass migration. The apparent avenue to achieve this is to have the GAMP promote local development in order to incentivize citizens to stay. These measures include trade related proposals such as market access for exports, integration of international financial markets, technology diffusion and the promotion of “‘good’ governance” practices, which should include democratic tools and the recognition of minority rights. GAMP will not replace existing and well functioning regimes such as the current international law for refugees and asylum seekers. These would remain in place as a protective measure for individuals. Notably missing from Straubhaar’s proposal is any recommendation or consideration of oversight or enforcement mechanisms.

Straubhaar’s proposal has received little attention since its publication in 2000. I suspect this is largely due to security concerns of the post 9/11 era and the economic declines associated with the financial crisis of 2007-2008. But it is likely that proposals similar to Straubhaar’s will at some point receive consideration once again. Although based upon a robust body of economics research, the GAMP remains unacceptably vague in its implementation details. Conceptually the idea is simple and represents standard neoclassical economic theory. Let market forces control the movement of people, by which what is really meant is labor. However, market forces are unlikely to create the optimal allocation of labor (because of “asymmetric macroeconomic incentives” a classical market failure will result), a migration fee scheme should be implemented in

order to eliminate brain drain and crowding out effects.⁴⁸ Those sufficiently motivated to move, meaning the rewards of moving outweigh the costs of moving, will move. Those left behind will be compensated by those leaving, through upfront fees and regular tax revenue.

The general economic theory upon which GAMP is based is the commitment to the free flow of capital. It is generally believed that when capital is free to move to where there are opportunities to be invested and a positive return on investment achieved, that it will create more benefits for all. However, this once agreed upon doctrine is being widely questioned today, both in theory and in practice. Consider this from the recent Pontifical statement on the economy:

an economic liberalism that spurns rules and controls. Economic liberalism is a theoretical system of thought, a form of “economic *a priori*ism”. It purports to derive the laws for how markets function from theory, these being laws of capitalistic development, but it exaggerates certain aspects of markets and downplays or ignores others. An economic system of thought that sets down *a priori* the laws of market functioning and economic development, without measuring them against reality, risks becoming a tool subordinated to the interests of the countries that effectively enjoy a position of economic and financial advantage.⁴⁹

This statement questions the methodology that claims how we should think about economic matters should be focused solely upon the economic effects of economic policies without taking into account other kinds of effects.

These same types of questions are being asked by the school known as “New Economics,” which raises significant questions about standard economic models, seeking to develop models that take into account issues of sustainability as well as social

⁴⁸ Straubhaar, “General Agreement,” 112.

⁴⁹ Pontifical Council for Justice and Peace, “Towards Reforming the International Financial and Monetary Systems in the Context of Global Public Authority.”

outcomes, such as equality, and human well-being.⁵⁰ Straubhaar could appeal to the “Washington Consensus,” a common reference to the program of ten key policies representing the requirements of economic reform for troubled economies as envisioned by the International Monetary Fund, the World Bank and other international financial organizations.⁵¹ The term has, in popular use, come to represent a commitment to strong markets and includes a commitment to open capital markets. However, increasingly there are calls for controls on the movement of international capital.⁵² In 2010, the IMF acknowledged that conditions could exist that justified the use of capital controls.⁵³

It is also possible to ask questions about who establishes the goals of such a program. Dani Rodrik, Rafiq Hariri Professor of International Political Economy at the Harvard Kennedy School wrote recently:

The most widely held theory of politics is also the simplest: the powerful get what they want. Financial regulation is driven by the interests of banks, health policy by the interests of insurance companies, and tax policy by the interests of the rich. Those who can influence government the most – through their control of resources, information, access, or sheer threat of violence – eventually get their way...It is a compelling narrative, one with which we can readily explain how politics so often generates perverse outcomes. Whether in democracies, dictatorships, or in the international arena, those outcomes reflect the ability of narrow, special interests to achieve results that harm the majority.⁵⁴

Although these thoughts are not constrained by academic rigor, they recognize the potential problems of a program such as GAMP, established by those who control

⁵⁰ This movement is distinct from Keynesian economics which is sometimes referred to as “new economics” by Mises and the Austrian School. It has its origins in the work of Sally Willington and is represented in organizations such as the New Economics Foundation (<http://www.neweconomics.org>).

⁵¹ John Williamson, “What Should the World Bank Think About the Washington Consensus?,” *The World Bank Research Observer*, 15(2000).

⁵² See Arvind Subramanian, “Coordinated Capital Controls: A Further Argument in Favor,” December 2, 2009, <http://www.piie.com/realtime/?p=1077>; and Paul Krugman, “Taxing the Speculators,” *New York Times*, November 26, 2009.

⁵³ Jonathan D. Ostry, et al., *Capital Inflows: The Role of Controls* (Washington: International Monetary Fund, 2010).

⁵⁴ Dani Rodrik, April 26, 2012, <http://rodrik.typepad.com/>.

important social and economic institutions. My goal here is not to review the current discussion regarding capital controls or to engage in a discussion regarding economic theory. Rather, it is just to demonstrate that the underlying rationale for GAMP, that the unrestricted movement of capital is always beneficial, is undergoing reconsideration. It is not unreasonable to expect that the same kinds of problems that are leading to this revision will crop up in a policy of unrestricted movement of labor. Straubhaar could respond that his proposed movement is not unrestricted. In the same way that capital controls may be appropriately implemented, so also the taxation or fee scheme Straubhaar envisions will provide a kind of movement control. The fee scheme can be adjusted in response to movement that is problematic. But this response is going to be determined by economic factors rather than the noneconomic factors that have been considered in the last few paragraphs. The fee scheme raises additional issues.

Straubhaar's fee scheme, in its implementation details, will become very complex. A progressive tax scheme will be required in which the actual fee paid is based upon the skills the migrant possesses and the current demand for those skills. This complexity has the potential to discourage movement rather than encourage movement, especially when it is most needed. A worker who is desirous of emigrating now, must come up with fees in addition to the cost of moving. Any worker unable to come up with those fees will not be able to move. Add to this the requirement of ongoing income taxation and the possibility exists that Straubhaar's proposal might aggravate irregular migration rather than resolve it. Unless the migration fees are small, workers will be incentivized to avoid paying them. If the fees are small, sending countries are unlikely to be adequately compensated for the brain drain and other effects associated with losing

highly skilled workers. In the case where a worker is moving to a liberal welfare state and will place a net demand upon the benefits scheme, the migration fee should be higher. This circumstance will affect most those with the least ability to pay the higher fees. Further problems exist because the migration fee is paid to the sending country with the intention being that some portion of it is shared with the receiving country. To the extent that sending countries have corrupt governments, it is not difficult to envision these fees neither being split with the receiving countries or utilized for the purposes Straubhaar proposes. Unscrupulous employers on the receiving side could take advantage of unsuspecting migrants by paying the migration fee up front and then exploiting the worker afterwards, as is often done today with various kinds of unskilled labor. Finally, there is the problem of taxing income based upon both residency and citizenship. This too will require new bureaucracies to both collect and enforce these new rules. Most countries will not be willing to routinely collect revenue to be transferred outside their control. Resolving these latter problems will require an international governance body, a proposal fraught with its own kinds of problems.

From the perspective of liberal political philosophy, Straubhaar's proposals will be disappointing. Liberal claims regarding the right to freedom of movement should not be subject to economic conditions or the payment of fees. After all, the idea of a right is that one possesses it regardless of circumstances. The establishment of migration fees focuses upon movement primarily as instrumental, whereas liberalism recognizes both the instrumental and intrinsic value of the right to movement. The proposal, although it seeks to leave intact current humanitarian schemes for refugees and asylum seekers, neglects noneconomic motives, such as family reunification or cultural interests.

Individuals whose motivation is principally noneconomic will be subject to these same migration fees. Such persons may be tempted to leave on a travel visa and overstay. It is likely under a program like GAMP that noneconomic motivated movement will eventually be relegated to a secondary status, always displaced by economic movement. This result would be disappointing and unacceptable to those sharing the commitments of liberalism.

In conclusion, the GAMP proposal requires significant development in order to make a true assessment of its feasibility. However, there are good reasons to believe that it will fail to achieve its goals of balancing global labor supply and demand and eliminating irregular migration.

*The New International Regime for the Orderly
Movements of People*

The New International Regime for the Orderly Movements of People (NIROMP) is a project sponsored by the International Organization on Migration (IOM)⁵⁵ and directed by Bimal Ghosh. The project is aimed at resolving the growing problems associated with international migration by creating a condition of “regulated openness.”⁵⁶ The project has its roots in a request of the United Nations Commission on Global Governance in 1993 to Ghosh to begin considering global migration issues. The NIROMP project began in 1997 with Ghosh as its head under the sponsorship of the

⁵⁵ The International Organization on Migration (IOM) was established in 1951 as the Provisional Intergovernmental Committee for the Movement of Migrants from Europe to assist in the resettlement of refugees from the Second World War. It now operates as an independent organization in diverse areas of international migration (see Jason DeParle, “Surge in global Migration Expands Scale of an Aid Group’s Influence, *New York Times*, August 31, 2011). The IOM is funded by the contributions of member states and other organizations.

⁵⁶ Bimal Ghosh, “New International Regime for the Orderly Movements of People: What Will it Look Like?,” in *Managing Migration: Time for a New International Regime?*, edited by Bimal Ghosh (Oxford: Oxford University Press, 2000), 220-221.

International Organization for Migration. Two meetings were held, in 1997 and 1998, attended by a small number of countries affected by international migration in either a sending, receiving or transit capacity. These meetings served to develop the framework of a regime of policies to be implemented by various countries.

The regime is organized around a set of six objectives. These objectives include, as numbered in Ghosh's summary:

- i. Enhance the capacity of governments and societies to deal with international movement of peoples through greater predictability and transparent policies and practices.
- ii. Widen the choice of the individual in migration by helping to avoid conditions of forced migration and enhance the confidence of the public and migrants in the policies and practices that form the international migration system.
- iii. Avoid negative externalities, interstate conflict and threats to domestic security caused by irregular and disruptive migration.
- iv. Enhance efficiency of the global economy through a more rational allocation of labor and skills and freer trade-related temporary movements and facilitate short-term inter-country cultural exchanges to strengthen common human values.
- v. Ensure predictable and effective protection and assistance to migrants, refugees and asylum seekers reflective of human rights and humanitarian considerations.

- vi. Facilitate a return to countries of origin or third countries characterized by freedom, dignity and full reintegration back into domestic society while promoting cooperation between the countries affected.⁵⁷

These objectives represent an attempt to provide as much freedom, security and provision for migrants as possible while seeking to minimize the effects upon the affected countries. Each of the objectives accomplishes this overall goal in some aspect. In the words of Ghosh, these objectives seek to “make movements of people more orderly, manageable, and productive and to provide, for this purpose, a comprehensive, multilateral framework which combines and balances the interests of all parties involved.”⁵⁸ The regime aims at orderly movement rather than free movement. The system to emerge from the NIROMP effort is not intended to replace existing policies, such as the UN Convention regarding Refugees or GATS, which are functioning well. The regime is multilateral, representing the interests and efforts of all affected countries. It protects basic rights and tries to account for the root causes of migration. Beyond agreement of the shared objectives, implementation of the new regime requires an integrated international policy structure and the establishment of an effective, international monitoring regime.

NIROMP aims to create an international system for managing the movement of peoples, replacing what Ghosh views as an inadequate collection of discrete national policies. In order to achieve this through NIROMP, Ghosh must provide two arguments. The first is an argument that demonstrates why the present system is truly inadequate, for it is possible to argue that the divergent discrete policies that countries currently have are

⁵⁷ Ibid., 221. I have paraphrased the objectives, although the verbs (i.e., enhance, widen, etc.) are Ghosh's.

⁵⁸ Ibid., 221.

acceptable if they were enforced. Until states recognize the need for a new objective in their policies apart from the protection of their national interests, there is no motivation to adopt a new regime, particularly an international regime. The second argument is one that establishes that NIROMP is the correct alternative regime to adopt. Ghosh targets the first need by arguing that the existing system is antiquated, designed to address the problems of immigration that existed at the end of World War II. Conditions have changed and so must the policies. The second argument is a consequential argument, based upon the gains to be made by adopting a new international policy framework.

Migration patterns of the last two decades have changed substantially from the period immediately following the Second World War. Driven by changes in the global infrastructure noted above in the discussion of Straubhaar's GAMP proposal, the two most significant changes in migration are the dramatic increase in both the numbers of migrants and in the number of sending countries. Between 1965 and 1990 foreign born residents, while remaining at 2.3% of the total population in the world, rose in absolute numbers from approximately 75,214,000 to 119,761,000, an increase of nearly 63%. In both North America and Western Europe, the foreign born population nearly doubled during the same time frame.⁵⁹ Current estimates of foreign born residents around the world are approximately 175,000,000. Diversity in sending countries has increased as well. Earlier patterns of migration often tracked to historical colonial relations. However, by the 1990s more countries were sending more people to more locations, creating new challenges of intercultural relations and integration. In the same time frame there were increases in the numbers of people seeking asylum as well as significant

⁵⁹ Bimal Ghosh, "Towards a New International Regime for the Orderly Movements of People," in *Managing Migration: Time for a New International Regime?*, edited by Bimal Ghosh (Oxford: Oxford University Press, 2000), 7.

demands for new labor in growing Western economies. The response of the receiving countries affected by this increased movement has been to establish more restrictive policies aimed at controlling movement without any attempt to address the root circumstances driving migration.⁶⁰ Although not always strictly enforced, these policies have lead to new problems associated with irregular migration, leaving migrants vulnerable to exploitation. As Ghosh writes: “when there is high emigration pressure in sending countries and powerful pull factors in destination countries, and especially when the two converge, regulatory restrictions alone cannot arrest the movements; they are simply diverted to irregular channels.”⁶¹ Such conditions arose in the 1990’s, indicating the need for a new international system for migration, one not based upon uncoordinated national sovereignty, but upon a set of international rules compatible with existing global political and economic contexts with the adequate flexibility to respond as these contexts change.

If we accept Ghosh’s argument that the current global migration circumstance is problematic in the ways Ghosh claims, an argument must be made that NIROMP addresses the problems of the current system, producing a system that achieves the desired end. Ghosh provides a consequentialist argument in support of NIROMP, claiming that it does address these problems and addresses them well. The NIROMP proposal must fulfill the six objectives that Ghosh has laid out for such a proposal.

The benefits of NIROMP identified by Ghosh can be characterized as either cost cutting measures or direct benefits accruing from the orderly movement of peoples. The cost cutting measures are tied to the pursuit of the first and third goals aiming at

⁶⁰ Ibid., 14-17.

⁶¹ Ibid., 17.

improving the performance of governments. As more and more countries have been increasing migration controls and enforcement measures their costs have dramatically risen. Reactive policies tend to be more expensive than policies associated with managing well controlled policies. Establishing consistent, transparent and harmonious migration policies across the globe will enable states to better respond to existing and changing migration patterns as well as enable migrants to more easily navigate the system by understanding the possibilities and criteria of movement. This should lead to a reduction in irregular migration with its high costs for both the migrant and the receiving country. Ghosh writes: “A global system of orderly movements, which is cooperatively managed, combining efficiency, equity and respect for human rights, could be extraordinarily consequential for the future of the liberal world order.”⁶² Reduced enforcement expenditures, reduced exploitation and trafficking costs will all lead to reducing costs of the new system.

It’s not just the reduction of costs that drives benefits. Improved abilities to meet labor demands in developed countries will drive an increase in the global economy from which sending countries will participate and eventually alleviate the sending pressures in those countries, leading to a reduction in migration. Ghosh cites economic studies indicating a doubling of global GDP in an unrestricted global labor market.⁶³ The allowance in GATS for some providers of services to be able to provide those services in foreign countries rather than just remotely over phones and computers recognizes that there is economic benefit to the liberalized movement of workers in the world. Studies

⁶² Ibid., 28.

⁶³ Ghosh cites B. Hamilton and J. Whalley, “Efficiency and Distributional Implications of Global Restrictions on Labour Mobility,” *Journal of Development Economics* 1414(1984): 61-75. Ghosh notes the optimistic assumptions of the study (labor supply is fixed and full employment in all markets) mean that the real effect is likely to be smaller, although still substantial.

associated with GATS have shown the possibility of improved export outlooks related to information based services in developed countries, indicating that the benefit of liberalized movement goes both ways. This benefit is largely tied to the fourth goal of NIROMP and is expected to consist largely of some proposal such as Straubhaar's GAMP that was discussed earlier. The bottom line of NIROMP is believed to be positive in economic terms.

What should a liberal philosopher think of these arguments? The NIROMP proposal is interesting as envisioned. However, it seems that it will fall victim to the same problem that many international agreements do. Without a strong enforcement mechanism, the benefits will be strongly constrained. Ghosh recognizes this problem and discusses the problem of a "hard instrument" versus a "soft instrument." Ghosh envisions a soft instrument, one in which countries retain their sovereign decision making processes and national enforcement mechanisms. States will join NIROMP because they see it is in their best interest, just as states have chosen to commit to GATT and GATS in order to participate more fully in international trade. However, a system without enforcement encourages free-riding. Leaving free-riding states out of the system will encourage migrants from those free-riding states to continue costly patterns of irregular migration. GATT and GATS, which rely upon soft instruments for enforcement, can in many ways be considered morally troubling. Conceived, molded and operated by the dominant economic powers of the West, the institutions associated with world trade are viewed as exploitative of less powerful countries. Some countries are compelled to tolerate such exploitation in order to gain at least some benefit from the system. I think it is a legitimate concern whether such circumstances might also arise as regards migration.

Such asymmetries of power are troubling to liberals and it is doubtful that proponents of the open borders vision will find the regulated openness of NIROMP an adequate expression of liberal egalitarian concerns. Further, NIROMP leaves fully intact the Westphalian rights of states which have been questioned from the open borders side of the debate. The communitarian side of the debate might also be concerned that NIROMP doesn't adequately address their concerns. If the proposal were successful, it could lead to significant pressure for states to open their doors in ways that compromise the integrity of cultural values. Although this problem always exists, the establishment of international regimes that place pressure upon this might be considered troubling.

Ghosh, like Straubhaar, would leave existing agreements, such as those that apply to refugees, in place. This potentially creates integration problems that may or may not undermine the NIROMP. Additionally, NIROMP at this time provides for no prioritization of movement. It is uncertain how many people might opt to move under NIROMP and whether the numbers might increase over what they are today. If there are more people that desire to move than can move, some prioritization scheme, per Wilcox, will be required but is unaddressed. Any prioritization scheme will treat people unequally because some will move and some will not be able to move, even when they want. NIROMP itself, while an attempt to open borders, may be viewed as illiberal, unable to address the central concerns of theorists such as Carens and Cole. Without a more detailed view of NIROMP it is difficult to assess it from the moral perspective.

Finally, the benefits outlined by Ghosh do not address all of the goals of NIROMP. Those goals which relate to the rights and noneconomic lives of migrants (second, part of the third, fifth and sixth goals) are not addressed by Ghosh as being

beneficial. But it is these goals, the reduction of forced migration due to war and natural disasters, the right of return and reunification, the expansion of choice and the reduction in the exploitation of migrants that are of most interest to the moral philosopher. They receive the least amount of attention from Ghosh. Why is this? It is not because they are not recognized as problems in the current migration regime; they are, or he would not have included them as problems to be resolved by the project. Perhaps it is because he thinks they will be achieved as byproducts of the other benefits and therefore, do not need direct attention. Or perhaps it is because the other arguments will be better received by the international community or that they are more concrete and measureable. Whatever the reason, Ghosh's neglect in recognizing improvement in rights conditions and other aspects of life as a positive benefit of NIROMP is troubling because it leaves a central concern of the open borders debate treated as unimportant, to be resolved by addressing other problems. Even when Ghosh recognizes the importance of resolving these issues, it is because it enhances the systems efficiency, encourages migrants to return home and makes the project more cost effective.⁶⁴ It is not because the respect of these rights and the people who hold them is important. This leaves one to question the balance of priorities in the project. Without direct attention to rights and the benefits to people that are achieved when rights are respected, rights as a motivation for changing the system of migration are likely to be pushed to the background in an unacceptable manner.

Conclusion

This chapter has reviewed a number of different proposals, characterized as either nonideal or international regimes. The nonideal proposals are uncomfortable with the

⁶⁴ Ghosh, "What Will it Look Like," 225.

current state of actual people in the world, people who cannot wait for the theorists to find consensus in their debate. Real people need relief from their oppressive conditions now. I examined two proposals in this area: the possibility that migration is a superior alternative to aid as examined by Frederick Whelan and the development of a Global Principal of Harm by Shelley Wilcox. Whelan considers the reasons for why migration options are superior to the use of aid to relieve conditions of suffering in the world and finds the argument unconvincing. At best, migration is something that could be done concomitantly with aid. Wilcox's argument seeks to establish priority among migrants, determining who gets in first, something that none of the ideal arguments examine. Those who suffer a deficit of human rights as a direct result of harmful actions by states should be prioritized in accordance with her GPH ahead of those whose motivation in movement is driven by nonrights deficit related reasons. Proposals such as these, while bringing to the fore salient issues that need to be considered within the scope of the open borders debate, do little to resolve the fundamental disagreement of the debate because their application is to particular contexts. In the absence of those contexts, they say nothing as to what migration policy should be.

I also examined two proposals characterized as international regimes because they seek to establish a set of international protocols as part of international law. Thomas Straubhaar's General Agreement on the Movements of People is an economic proposal that seeks to balance the allocation of labor based upon global labor markets. Included in the proposal are migrant taxes to mitigate the effects of negative externalities of migration and an income tax proposal based upon both residency and citizenship. Migrants will pay taxes to both the state in which they reside and the state in which they

hold citizenship. This proposal was found wanting in that it creates an inordinately complex tax scheme which may actually discourage movement or encourage irregular movement. To the extent that GAMP places economic concerns above moral concerns it will also be troubling. Finally, I examined Bimal Ghosh's NIROMP proposal. This proposal also does not appear able to address the liberal concerns that created the open borders debate in the first place. Although it recognizes the importance of rights and the conditions of life for people, it pushes them too far in the background, leaving them only to service the more obvious economic ends of the project.

The problem that now exists is that none of the arguments examined thus far, as representative of the typical arguments made in the debate, have served to move us further towards resolving the liberal question of borders: Are states morally justified in controlling movement across their borders? In order to resolve this question, I believe that the debate must be reframed and a new direction found. It is to that task that I now turn.

CHAPTER 5

MORAL CONSENSUS IN THE OPEN BORDERS DEBATE

In this chapter I turn to the positive aspects of this project. To this point I have argued that there are problems in the different positions within the open borders debate that prevent one view from becoming universally (or nearly so) accepted. Although I have not argued for it in this thesis thus far, I believe that theoretical debates in political philosophy should be conducted in a manner that can influence policy makers. The failure to do this has been true of both the theoretical and public debates regarding immigration policies with the result that normative considerations, and in particular the normative considerations regarding open borders considered in the previous chapters, do not influence existing national immigration control policies.¹ Neither comparative nor theoretical work regarding immigration policies indicates that moral considerations occupy a significant role.² Neither does this debate, through its primary proponents or

¹ For a dissent on this conclusion, see Debra L. DeLaet, *U.S. Immigration Policy in an Age of Rights* (Westport, CT: Praeger, 2000), 1. She writes “in recent decades, civil rights discourse has been a fundamental factor in determining the policy alternatives available to the U.S. government in its efforts to regulate migration.” This conclusion, however, which spans a history far longer than the debate under consideration here, seems to be driven by different set of moral considerations than those in the open borders debate.

² For support of this claim see Eytan Meyers, *International Immigration Policy: A Theoretical and Comparative Analysis* (New York: Palgrave MacMillan, 2004) and Eytan Meyers, “Theories of International Immigration Policy – A Comparative Analysis,” *International Migration Review*, 3(2000): 1245-1282. None of the literature cited in this thesis appears to be of concern to the comparative and theoretical study of immigration policy. Gary P. Freeman, “Comparative Analysis of Immigration Politics: A Retrospective,” *American Behavioral Scientist* 55(2011): 1541-1560, identifies four significant trends in immigration politics since 1979 (the year Freeman authored the first monograph in English on immigration issues), none of which are tied to the literature of this thesis. The closest trend, “Democratic Politics and Liberal Immigration Policy,” focuses upon the disconnection between policies, which tend to be liberal, and the popular view which tends towards greater restriction. Freeman focuses on Switzerland, which has

others, appear to play a role in the public debate about immigration. This raises a question: Why is the moral debate of political philosophers regarding borders without influence in shaping immigration control policies?

It is an assumption of this thesis that the theoretical debate considered thus far should influence policy makers. The problem of immigration, both legal and illegal, is a significant issue for most governments in the Western world. It occupies a prominent position in public debate for both politicians and citizens. Those whose theoretical work is so closely tied to a prominent public issue should have in mind that their work should address the problem at some point. Theoretical work that fails to achieve this goal should be revised in a manner that does achieve this goal. This is not to claim that theoretical work is inappropriate, or more specifically, that the theoretical work done on borders is inappropriate, but rather it is a claim that we must be mindful of the necessity to bridge the gap between theoretical work and political practice. The influence is not always direct, and ultimately, the philosopher does not determine how influential his or her ideas will be. As Phillip Petit writes: “It would be utopian to think that what happens in politics is a function of the normative ideas that circulate in and around the political world.”³ Nor is the quality of the ideas a relevant factor. Good ideas and bad ideas are put into political practice. However, the foundation of these ideas is important. Petit again: “Yet normative ideas are of first importance in political life. For it is only possible for politicians and public officials to gain support for the policies they pursue to the extent they can represent them as legitimate...motivated by this or that...agreed to

a national referendum process, where popular support has lead to more restrictive immigration related policies despite opposition to those referenda by those in government.

³ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), 1

commitment.”⁴ Political philosophers involved in a debate about immigration, with its obvious implications for policy, need to rethink how the debate is proceeding and whether there is a more productive way to frame the problem and its resolution. In this chapter I will suggest a new focus for framing the debate in order to be more influential in the public debate regarding immigration.

This new focus relies upon the idea that at the heart of debates about open borders, there is a consensus position. When the moral perspectives in a debate become fragmented and polarized, as they are in the open borders debate, an avenue to bridge these divergent perspectives is the development of a consensus position from which we can begin our consideration anew. I borrow this approach from Jonathan Wolff and Avner de-Shalit’s book *Disadvantage*. In the first section of this chapter I will explore this approach and what it means to develop this kind of moral consensus. In the final section of this chapter I will identify and explain the position of moral consensus that exists in the open borders debate.

Developing Moral Consensus

Jonathan Wolff and Avner De-Shalit in *Disadvantage*, claim that the identification of a moral consensus representing the central concerns of divergent normative claims regarding the same issue is a means to overcome the problem of polarization and influence public policy.⁵ The book presents a three step process. First the consensus position must be identified. The middle step is to explore the meaning of the consensus, both abstractly and how it is experienced in the world. The final step is to make policy recommendations that reflect the manner in which the consensus is found in

⁴ Ibid.

⁵ Jonathan Wolff and Avner de-Shalit, *Disadvantage* (Oxford: Oxford University Press, 2007), 3-4, 10-13.

the world with the intention of resolving the associate problems.⁶ In the context of liberal societies the implementation of social policy requires a public consensus regarding the problem and the solution upon which the policy can be based. The absence of a public consensus will leave specific policy prescriptives contentious and undermine the ability of the policy to achieve the identified goals. Achieving this public consensus relies upon an underlying theoretical consensus. The absence of theoretical consensus will leave public policy unaffected because of the inability to generate the public consensus upon which the social policy can be founded. Therefore, the route for political theory to affect public policy is to identify a theoretical consensus upon which many can agree and towards which policy can be aimed.⁷ Such an approach enables policy makers to target that which is most essential. In this thesis I focus on the first step of their process, the identification of the consensus position.⁸

The idea of equality in philosophy is a highly fragmented concept with the problem being identifying in what way people should be equal. Various accounts have argued for equality of resources, opportunity, well-being, opportunity for well-being, or respect to name a few of the accounts. Wolff and de-Shalit claim that because there are so many versions available, a commitment to one of them by a policy maker for implementation purposes would lead to the policy being opposed by both nonegalitarians and egalitarians alike, who would prefer to use a different account of equality. This leaves the potential public policy without widespread support, a condition that is sure to

⁶ In *Disadvantage* step 1 is completed very quickly in the Introduction. The first part of the middle step, the theoretical understanding, is in Part 1, the experience of the consensus in the world is in Part 2, and the final step of policy recommendations is in Part 3.

⁷ Wolff and de-Shalit, 3.

⁸ Wolf and de-Shalit do not give adequate attention to this problem in their volume, assuming that the egalitarian literature is understood and that others will agree with their consensus. It's not obvious to me that this is the case.

doom any policy. But Wolff and de-Shalit note another problem of egalitarian theories within academic philosophy. They are constructed in ways that ensures they will leave no mark on public policies. They reach for a level of abstraction that separates them from the world in which policies are implemented. The theory becomes disengaged with the real world, developing bizarre and unreal examples and counterexamples. To resolve these problems Wolff and de-Shalit seek to develop an account of egalitarian theory that is useful for public policy, that is, that can be used by governments to move society towards being a society of equals.⁹

The task then, is how to take these useful discussions about distinct perspectives regarding equality to the point where they can affect policy: “for the purpose of social theory it is necessary to see how a broader consensus within egalitarianism can be generated. If theorists fail to meet this challenge they risk leaving social policy in a theoretical vacuum, or perhaps in chaos where any theory is treated as if it is as good as any other.”¹⁰ In response to this need Wolff and de-Shalit do two things. They set themselves to the task of identifying the broad consensus shared by the divergent perspectives of egalitarian thought from the perspective of what policy can do. They then use empirical data, in their case, interviews, to provide a check upon the consensus theory they develop. Wolff and de-Shalit, after identifying the egalitarian consensus as identifying the worst off and improving their position through the elimination of disadvantage, spend the majority of their book developing an understanding of disadvantage as experienced by people. Finally, they develop explicit policy

⁹ Ibid., 3-4 and 10-13.

¹⁰ Ibid., 3.

recommendations. I would like to say two things about this process of identifying consensus.

Consensus, in the manner used by Wolff and de-Shalit, identifies a commitment that represents the central concern of the different theories in the domain, the condition which the theories intend to resolve. This task isn't straightforward in the sense that one can simply line up the stated principles of each theory and find the ones that are equivalent. It requires some interpretation to figure out what problem is being solved, what characterizes the end it aims at, and then to develop a principle that can represent this concept. The resulting principle won't necessarily use the same language, but will capture the same problem and aim at an end that resolves, or at least begins to resolve, the problem. One reason why the language of the theory and consensus principle differs is that the consensus principle must be turned into policy prescription. Theoretical principles are often not worded in ways that can be readily implemented. In the case of Wolff and de-Shalit, the commitment of egalitarian sufficiency theories (the idea that that everyone should have enough of certain goods), when coupled with the contextual reality of finite or limited resources, translates into a policy principle of identifying the worst off¹¹ and improving their position.¹² Those who are worst off are characterized by their disadvantages, especially clustered disadvantages. What public policy should do, in an environment in which there are inadequate resources to do everything or to provide enough of the right kinds of goods, is eliminate disadvantages. The elimination of

¹¹ This should not be confused with the notion of worst-off or least advantaged in Rawls' difference principle. Wolf and de-Shalit are concerned about people having sufficient resources to eliminate disadvantages, which will still allow a great amount of inequality in society. Rawls aims at a stricter form of egalitarianism in which differences are only permitted if it is to the advantage of the worst off. The scope of Wolff and de-Shalit is much more limited than Rawls.

¹² Ibid., 3.

disadvantages (which is not money alone) improves the conditions of those without enough. What is important for my purposes here is not to evaluate whether this is the correct consensus principle for the egalitarian debate, but to demonstrate how abstract egalitarian principles can be translated into a shared principle that is applicable to policy development. This consensus principle doesn't contain the actual elements of policy. However, it does make the policy task plain. Identify the conditions of disadvantage that make someone worst off and figure out what can be done to eliminate those circumstances. These largely empirical tasks must be completed within the political context of policy. The consensus principle remains stable even in the midst of the policy debate. As particular kinds of disadvantages are eliminated or substantially reduced, policy can change to focus on other kinds of disadvantage. The consensus principle, help those who are worst off by eliminating disadvantage, doesn't change even as policy addresses new or different disadvantages. What is important to note here is that the bridge between theory and policy has been intentionally crossed. The identification of consensus gets us part of the way across the bridge with the translation into policy language completing the task.

The kind of consensus to which I am referring here should not be confused with the concept of overlapping consensus as proposed by Rawls. The Rawlsian conception represents a political conception that could be embraced or endorsed by people who share a wide range of reasonable conceptions of the good or comprehensive doctrines.¹³ The overlapping consensus contains value commitments but is explicitly political, relating to the basic structure of society. In the case under consideration here, the content of an

¹³ John Rawls, "The Idea of an Overlapping Consensus," *Oxford Journal of Legal Studies* 7(1987): 1-25 and *Political Liberalism*, 144.

overlapping consensus relates to the commitments of liberalism, principally the equal moral worth of all people, which drive the open borders debate, not to the moral principles we derive from the debate about immigration policy. As such, the consensus I am aiming for here is derived from the principles contained in the overlapping consensus that Rawls appeals to. Each of the positions I have considered in earlier chapters should be compatible with the overlapping consensus. Presumably each of these positions, including my own consensus, could be endorsed by people with various conceptions of the good. The overlapping consensus is intended to provide unity and stability to the political system in that it is a system to which different people could be committed without compromising their own vision of the good. In Rawlsian terms, the consensus I propose must be able to be endorsed by different groups from their own point of view in order to be considered compatible with the overlapping consensus.

Finding an actual consensus principle is different from finding a consensus principle that *could* be shared by all the theories. This latter process represents theoretical work rather than practical work. The distinction is subtle but important because it recognizes the value and place of the theoretical work and recognizes that there are two tasks here. The first is the theoretical work that enables us to think about problems outside the limiting bounds of public policy and practical considerations. The second task is the translation into policy terms. If we start and end in the policy realm, then we are likely to implement policies much like other policies already implemented, rather than to find new and perhaps better ways, of addressing social concerns. As Wolff and de-Shalit note, both sides of the process need the other.¹⁴ Philosophers need to be mindful of the world in which people live and to which policy applies, while policy work

¹⁴ Wolff and de-Shalit, 3.

requires a solid conceptual foundation that is outside the practical world. The two tasks go hand in hand.

Identifying consensus in these divergent theoretical positions is not about negotiation. It is not about trading ideas such that one theory contributes one principle while another theory contributes a second principle. It is about identifying that which represents the central concern shared by the different positions and enables the concerns and aims of the theories to be at least partly achieved. Policy making in the world of political practice will involve negotiation, particularly if there are multiple paths to achieve the ends of the policy. The work of identifying the consensus principle is prior to this point. After the consensus of the theoretical work is identified, the central moral principle can be expressed. This principle can then be made manifest in public policy. It is at this point that negotiation becomes part of the process.

I am now ready to turn to my final task of identifying the moral consensus in the open borders debate, in a context compatible with the world of political practice.

Consensus in the Open Borders Debate

Identifying the Consensus

The development of a consensus in the open borders debate requires the distillation of the arguments for both open and closed borders into a shared consensus about what is important, that is, the central moral concern of the open borders debate. Each side of the argument raise issues of importance to human lives that immigration policies should, on the one hand, foster, and on the other, not undermine. Central to the arguments of the open borders debate is the effects of border controls upon the lives of innocent individuals, individuals who have done nothing to deserve their lot in life. Born

into a context, be it rich or poor, people on the move do so because they are pursuing a better life in a new place or they have been forced to move by circumstances beyond their control. Carens, for example, commonly opens his pieces with the story of some poor person, threatened in the present by those who have enough, simply for trying to better his or her life. Walzer and Miller bring to the debate the interests of those who wish to protect some way of life they have come to know. Their interest is not so much aimed at keeping others out as keeping what they have, that which is both familiar and meaningful. From these divergent ideas comes the idea that the central concern of the open borders debate is the negative effects of border controls upon people, both those who move and those who do not. Rawls, in considering cosmopolitanism, identifies a similar concern: “The ultimate concern of a cosmopolitan view is the well-being of individuals and not the justice of societies.”¹⁵ Although theoreticians such as Cole suggest that the concern is about reaching a theoretical coherence that follows from fundamental liberal commitments, the reason coherence is important is because the lack of coherence affects the lives of people, often in profoundly negative ways. The inability to move often undermines the possibility of people leading lives that those individuals find meaningful. Therefore, it is reasonable to conclude that the central concern of the open borders debate among liberal political philosophers regards the effects of the ability or inability to move upon the possibility of individuals leading lives that are meaningful.¹⁶ Recognizing that

¹⁵ Rawls, *Law of Peoples*, 119.

¹⁶ A more difficult task than what I have attempted here is to find a consensus between liberals and various nonliberal positions, such as political realists. That consensus would undoubtedly be more difficult to achieve. To the extent that widely divergent positions exist within these various larger groups one reasonable approach is to find consensus within these larger groups, which is the task I have undertaken here for liberal political philosophers.

it is the effect upon individuals that is central to both sides of the debate, I suggest the following as the consensus view of the open borders debate:

The right of states to control their borders is constrained by the moral obligation of a state to give appropriate regard to the interests of both itself and other states and of individuals (both inside and outside state borders, without regard for citizenship) affected by their immigration control policies and to minimize or eliminate the negative effects of those policies.

On this consensus states are able to control their borders, determining who gets in and who does not, who can stay and who cannot, provided they take into account the effects of those control policies, including the specific decisions that follow from those policies, upon itself, other states and all individuals, affected by the policy. When those effects are negative, the state must take action to minimize or eliminate the negative effect. Further explanation and justification is warranted.

In exploring the meaning of this consensus statement I want to focus upon four different aspects. The first is why the focus of the consensus statement is the state rather than the individual. The second is to understand the nature of the constrained right for states. The third area is the problem of interests. The final aspect is the problem of determining negative effects.

The State in the Consensus

The focus of the consensus statement is upon the state rather than the individual because the state plays a basic role in organizing life. Life together, as schemes of social

cooperation, requires coordination.¹⁷ Whenever people live together, as part of the normal course of events, problems arise which require an institution to which people can appeal in order to resolve these problems. Any scheme of cooperation involving a sizeable number of people requires structuring that reaches beyond the problem of conflict resolution. As society grows the institutions of coordination become more complex, tending to become plural rather than unitary. As institutions from different geographic regions come into contact they recognize that some issues are best coordinated across small geographic units whereas other issues require coordination across large geographic units.¹⁸ The state, in our current context, represents one level of a complex scheme of institutions designed to coordinate human activity. Look beyond the state, to organizations of global governance and coordination, and there is no unqualified acceptance and the success of such organizations is problematic in many cases. Look below the state, to smaller regional organizations such as states, provinces or cities and one finds unqualified acceptance and success but an inability to provide coordination for large issues, such as migration, because they lack the requisite authority. As a process of history, it is not inconceivable that in the future migration might be controlled by some institution other than the state, but such a scheme is problematic at the present time. The state, then, is a valuable institution for coordinating human activities.

This claim is simply an instrumental claim: the state accomplishes a necessary function related to human activity. Given the importance of the state in framing and

¹⁷ By coordination I simply mean establishing rules towards minimizing the conflicts between people that enable them to pursue their individual lives. I do not mean to imply some kind of centralized, detailed planning effort that directly determines people's lives.

¹⁸ Although I focus upon geographic units here, I am not convinced that geography must be the determining factor for all issues. It might be that the boundary is determined by who is covered and the geographic boundary is then just a convenient way to express where the boundary falls.

coordinating human activity, it is appropriate to focus upon what the state can or cannot do. This claim does not rely upon arguments of nationality and self-determination, although it is compatible with them. It will permit states to function in the absence of a national identity, recognizing that in many cases the existence of states is arbitrary, manufactured as a result of human decisions rather than being the product of the more natural process that Miller envisions creates nationalities. Both kinds of states receive standing in this consensus. This claim about states is not intended to undermine the important standing of the individual in liberal theory. The state has moral standing because it represents collective action with profound effects, both negative and positive, upon individuals.

People live in a world of states, and to be stateless, as Walzer notes, is to have one's life always at terrible risk.¹⁹ Conceding that states exist and provide a valuable function is not the same as a claim that states should exist or that they should exist in some particular form with a specific set of rights. It is a factual claim, that states do exist, in a wide variety of forms and that it is not morally troubling that they do; it is, rather, morally valuable that they do exist. If people are going to live together and cooperate with one another, some institutional scheme must exist. However "frayed" the notion of state is with its rights being "disaggregated or unbundled,"²⁰ it remains the current context. Even as theorists reconceive the state in various ways, such as the disassociation of the state with control over territory but instead with control over those to whom it

¹⁹ Walzer, *Spheres of Justice*, 32.

²⁰ The phrase is from Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 1.

provides services,²¹ states as a way of organizing life will remain for the foreseeable future. Although there are many states, it is reasonable to assume that coordination is facilitated by a smaller number of institutional organizations, rather than a larger number. Complex global coordination is hard to envision if all aspects of coordination occurred at the municipal level. Similarly, at this time it is difficult to envision a single organization coordinating this activity, especially mindful of Kant's warning regarding the global state.²² What, then, exist are multiple states needing to coordinate their activities with one another.

The situation does not change with the existence of suprastate organizations. Suprastate organizations, such as the European Union, do not abrogate the authority and importance of the state, but derive their limited authority from the authority of the state. The European Union has only the authority that its member states have been willing to cede to it. This is, in a very real sense, a social contract among states, in that the EU receives its authority from the consent of the governed and is constrained by those who give it its authority. Even here, though, the freedom of movement legally possessed by citizens of EU states has on several recent occasions been rejected when domestic political situations required it. The commitment to being European has not sufficiently overridden the commitments of national identity.

Financial problems in 2012 related to the euro demonstrate the problem of collective commitments without adequate enforcement mechanisms. The commitment to

²¹ See Cole, *Philosophies of Exclusion*, 74-76 for the suggestion of a model in which any government organization has the ability to tax those to whom it provides services but has no control over whom can be in the area in which it provides services. Territory plays a role because the area of service is bounded, but not importantly so. The state in this model seems to function no differently than a local utility company (or Nozick's dominant protection agency).

²² Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch*, in *Perpetual Peace and Other Essays*, trans. by Ted Humphrey (Indianapolis: Hackett Publishing, 1983), 124-125.

a shared currency is undermined by the failure to provide fiscal and monetary institutions with the authority needed to deal with crises. Coordination without authority, which may work well in good times, is problematic in challenging circumstances. The focus, therefore, must be upon an institution with the required authority to enforce policy. From a different perspective, supranational organizations such as the EU simply move the problem. One is free to move about within the member states, but those residing outside any of those member states are not free to move inside those boundaries. Borders distinguishing those who are in from those who are out still exist at any border between a member and a nonmember state. The state, then, remains valuable as an existing organizing feature of life and is not undermined by the presence of larger organizations.²³

From the perspective of the open borders school, one might expect the focus upon the state to be inappropriate. The focus should be upon the individual, specifying what individuals should be able to do. While there is value in recognizing what it is that individuals should be able to do, it is more appropriate, as an issue of global justice, to focus upon the institutions which ensure the conditions of justice and create the context in which people live their lives, particularly if the idea of global justice is to be about something more than individual well-being. Above I claimed that states have moral justification; here the claim is a pragmatic one. It is states which are the important actors in creating and assuring the conditions of both social and global justice.²⁴ Even if the conceptualization of global justice is as uncertain as Nagel claims,²⁵ it is still possible to

²³ As noted by Nagel: "However imperfectly, the nation-state is the primary locus of political legitimacy and the pursuit of justice." Nagel goes on to question whether the nation-state can serve the same purpose in justice globally that it serves domestically. Thomas Nagel, "The Problem of Global Justice," *Philosophy and Public Affairs* 33(2005): 113.

²⁴ Using a standard distinction here that social justice is domestic and global justice relates to concerns of justice that are irrespective of national borders.

²⁵ Ibid.

recognize that people live in deplorable conditions around the world and that the state has tremendous ability to improve those conditions. This conclusion requires no fixed conceptualization of global justice.²⁶

That the actions of the state are the proper focus of the consensus is also indicated by the fact that an overwhelming majority of people in the world, including those living in unacceptable conditions of poverty and oppression, do not wish to move. Whether it is the intangible preferences and affections that tie people to place and others, or Straubhaar's "preference for immobility" that is tied to "location specific advantages" explainable in strictly economic terms, the simple fact of the matter is that most people, including those with the resources and opportunities to move, do not move. Focusing upon the right of people to move in the face of the limited demand to move neglects the needs of those most greatly affected by global injustice. This leads to the focus upon how the state creates the environment that permits movement and the effects of its denial for those who wish to move. Focusing on the context is more likely to create a positive environment for movement than a focus upon a right that will be little exercised. Making the state the central focus of the consensus places obligations upon the state that will affect those who do not move, since the state must consider the effects of their policy upon those affected, which includes both migrants and nonmigrants. Finally, some proponents of the open borders argument, in particular Carens,²⁷ allow that under at least some conditions states may control their borders, even in an open borders scenario. If there are some conditions under which those who argue for open borders concede border

²⁶ Amartya Sen, "What Do We Want from a Theory of Justice," *The Journal of Philosophy* 103(2006): 222.

²⁷ Joseph H. Carens, "Democracy and Respect for Difference: The Case for Fiji," *University of Michigan Journal of Law Reform*, 25(1992): 547-631.

control, the concern shifts from, can borders be controlled to how borders should be controlled. Under what conditions can states restrict entry into their country?

Rights and Constraints in the Consensus

If it is morally permissible, within liberal theory, for states to restrict entry, under what conditions or situations should states be able to do this? How should this right of states be understood? There is both a positive and a negative assertion being made in the consensus statement. The positive statement is that states do have the right to control their borders. The negative assertion is that this right is not absolute, there are constraints placed upon it. The state cannot control borders without considering the effects of those controls and responding appropriately to negative effects. This ties how the right to control borders is implemented directly to the results of the border controls. More should be said about constrained rights.

David Miller, in the context of immigration, has proposed the distinction between *basic* freedoms and *bare* freedoms. Basic freedoms represent things that people should have no matter what else they have. They are rights to be claimed regardless of the circumstance and place obligation upon others. Bare freedoms, on the other hand, are contextual and while their possession might be worthwhile, it is not obvious that the moral implication of not having the freedom rises to the same level as a basic freedom. Bare freedoms do not place obligations upon other people to ensure that they are provided. A case must be made that the possession of a freedom is morally significant and that constraint upon it is morally troubling in ways that require it be treated as a basic

right.²⁸ Basic freedoms place constraints upon the actions of states, bare freedoms do not.

Miller distinguishes between basic and bare freedoms by grounding basic freedoms in human needs, whereas bare freedoms are rooted in contingent human ends.²⁹ An example will serve to show the difference. All people have a need for food in order to survive. Thus, the need for some minimal level of nutritious sustenance becomes a basic right. As a basic right it places obligations upon all to ensure that it is met. But people can be sustained by quite a wide range of foods, and the need for sustenance doesn't translate into a claim regarding particular foods. It would be good to have the desires for particular foods met, but this desire is not rooted in human needs and therefore, at best, is recognized as a bare freedom. In the context of global justice, Miller would say we all have obligations to end starvation; we do not have obligations to provide a diet filled with the foods desired by those who are starving. Miller applied this distinction to movement as discussed earlier: more movement is a good thing, but not one that we can require that all take positive action to ensure. Taking this same distinction and applying it to the state right to control borders, states have a bare freedom to control their borders. The right to control borders is not tied to the basic needs of a state, but is tied to the contingent ends of the state. The right to control their borders is therefore something good to have, but is constrained. But how it is constrained needs to be explained. Nozick's idea of side constraints is useful here.

Side constraints focus not upon the moral standing of the end goal but upon the methods that can be used to achieve the goal. We don't seek to determine whether some

²⁸ Miller, "Immigration: Case for Limits," 194; *National Responsibility*, 204.

²⁹ See Miller, *National Responsibility*, Chapter 7, for his account grounding basic freedoms in human needs.

particular goal has acceptable moral standing, but we assess the process by which that goal can be achieved. Side constraints are moral constraints that should not be violated in the pursuit of final ends.³⁰ Although Nozick intends not to focus upon the goal, the idea of side constraints is compatible with those circumstances in which the goal has been determined as acceptable but the concern is how to achieve that goal. Side constraints are compatible with the claim that states may control their borders but places limitations upon how states may go about achieving that goal. States are constrained by the need to consider the effects of their actions and eliminate the negative effects. The reason we care about how states go about controlling their borders is because of the liberal commitment to the individual. Individuals hold a position of importance in liberal theory alongside the moral value of the state. This constraint reflects the central moral concern of the open borders debate regarding the effect of border control policies upon all individuals. Constraining the states in this manner also reflects Kantian commitments regarding the use of the individual as mere means.³¹ Individuals cannot be used as means by states in the control of their borders. This perspective brings to the front the central concern in the open borders debate: the effects upon all individuals of border controls.

One benefit of stating the consensus in terms of a constrained right is that it can respond to the constantly changing conditions in the world experienced by people. The constraint remains stable even as the context changes and new kinds of negative effects emerge which the state needs to take account of. If the statement is left merely in terms of an unconstrained right, then the state will be free to do what it chooses in controlling borders. But circumstances change and what might presently be an acceptable type of

³⁰ Nozick, *Anarchy, State and Utopia*, 29.

³¹ See Nozick's discussion regarding Kant and side constraints. *Ibid.*, 30-32.

control might in the future be unacceptable. Technological advances change conditions around the world in a way that affects migration. The dispersal of call centers supporting American business throughout the world might be perceived as minimizing the negative effects of border controls. Prior to this dispersal individuals would have needed to move for their economic improvement, whereas now technology enables the job to move to them. The consensus as expressed doesn't need to change to address these new circumstances.

One of the primary reasons for rejecting a formulation of the consensus in terms of individual rights has already been identified by determining that the effects of state action is what is important. A further reason is that in a world of states it is difficult to identify a positive right that can be claimed against multiple states.³² Arguments for a universal right of entry have been controversial because it creates a political claim against a sovereign power with which the claimant has no relation. Most states will reject a claim against their sovereignty to guarantee the movement of those outside its jurisdiction into its jurisdiction. Individuals will also find it difficult to fight the denial of a right to movement against strong and remote countries.³³ The focus of the right of movement guaranteed within documents such as the UDHR and ICCPR is a right that can be claimed against one's own state and therefore, presumably enforced. In these documents the citizen is guaranteed the right of exit and return, a claim that is held against an

³² Negative rights are routinely claimed against multiple states.

³³ This problem should not be confused with the ability to move between subnational states or provinces. If I attempt to move to Idaho from Utah and am denied entry by Idaho, I claim the enforcement of my right to move against the U.S. Federal government, rather than the individual state governments. I request that the Federal government require Idaho to respect the right granted to me by the Federal government. The key factors are who grants the right and the degree of autonomy accorded to the particular government actors.

identifiable government which is that citizen's government and which is obligated to ensure that this right is not violated.

The constraints have been termed as a moral obligation, one that must be honored whether or not there is a legal framework requiring that the control of borders be done in a particular way. States, as organizations exercising authority, have boundaries to their authority, beyond which the state has no legitimate authority even if it might possess the ability to exercise its power. As with other organizations, the power of the state is constrained. If we envision it as rising out of the social contract, it is bound by the terms of that contract. But it is also bound by the context within which states exist and operate. States do not exist in an isolated world. Although the modern state derives its most basic rights from the Westphalian context, this context has been continually modified by the actions of these same states. The framework of international law put into place by these states modifies the context in which they operate. But this is not the only framework in which states operate.

Liberal states also operate in a moral framework similar to that in which each of us as individuals operate. State actions should be bound by our shared moral understandings because states draw their existence from the purposes of individuals whose actions are morally bound. What I mean by this, is that the state does not escape moral constraints because it is a faceless, amorphous institution. It acts on behalf of people living within its borders, achieving collectively what cannot be achieved individually. In the individual realm our actions are bound; so also are they bound in the collective realm. These moral understandings, within this context, are often translated into international agreements such as the UDHR, but not always. So I conclude that

states have a right to control borders, essential to fulfilling their functions, but coupled with a moral obligation which constrains how they can pursue the fulfillment of this right.

Individual and State Interests

The problem of interests is one of long standing disagreement in philosophical literature, especially when posed against the problem of people's preferences. The problem is how to characterize what an interest is, when a person has an interest and the role of preferences in interests. For example, in Feinberg's account of interests to say someone has an interest is to say that someone has a stake in the well-being of something: "a person has a stake in *X* (whether *X* be a company, a career, or some kind of 'issue' of events) when he stands to gain or lose depending on the nature or condition of *X*."³⁴ If I have a stake in a company, the better off the company is the better off I am. Feinberg divides interests into two categories. Welfare interests are those things related to the generalized conditions that enable a person to pursue other ends, such as health and adequate food. Ulterior interests relate to a person's aims or goals which require that welfare interests be satisfied. A person needs to have adequate food (welfare interest) in order to pursue a career as an opera singer (ulterior interest). White, whose work on freedom of association formed the foundation for Wellman's argument for closed borders discussed in Chapter 3, provided an account of integrity interests (related to fundamental individual values) and opportunity interests (related to fair access to goods with instrumental value).³⁵ The protection of these interests was used to morally evaluate the various reasons for which people were excluded from associations: one could not be

³⁴ Feinberg, *Harm to Others*, 33-34.

³⁵ White, "Freedom of Association," 378.

excluded for reasons that violate the respect of these interests. It is not necessary to develop an account of interests here in the first step of the consensus process. For my purposes here, I simply need to recognize that people and states have interests of some sort, deferring for the second step of the process concerns over what kinds of interests are legitimate or which are relevant to immigration. But it is the pursuit of interests, broadly construed, that creates the problems of migration and to assert that interests are important is unproblematic at this stage.

The claim that individuals hold interests may be approached from two perspectives. First, they hold interests of an individual nature. This recognition pushes the focus of interest down to the individual level. Migration requests are often focused upon specific aspects of an individual's life, such as marriage to a particular individual or the experience of particular cultural or religious experiences. Therefore, to include the consideration of these personal individual interests is reasonable. But this is not the only manner in which it is possible to think about individual interests.

As a matter of global justice, it is possible to say that people have interests in the conditions of justice, the context which enables justice to be achieved and thereby gives regard to their interests. For example, Brock identifies a three part concern of justice including the fulfillment of basic needs, basic rights and the required institutional context to support the continual fulfillment of the first two.³⁶ From this perspective, people have an interest in having their basic needs fulfilled, their rights respected and the ongoing expectation that these two conditions are not at risk. This was the focus of Wilcox's Global Principle of Harm discussed earlier. But it is inadequate to focus solely upon

³⁶ Gillian Brock, *Global Justice: A Cosmopolitan Account* (Oxford: Oxford University Press, 2009). See Chapter 3.

these contextual conditions of justice. People whose basic needs and rights are assured develop additional interests that are affected by constraints upon movement. These additional interests play a more prominent role in having a meaningful life for those whose basic needs and rights are assured. Their lack of fulfillment becomes a negative experience with potentially significant negative effects upon their life. Focusing solely upon the interests of context, while important, and more basic than individual interests, is inadequate by itself. The consideration of interests within immigration must focus on both the context in which interests occur and on particular individual interests.

States as well as people require consideration, for states have interests as the coordinating institution for the people that reside within the state. Although this might appear to undermine the liberal commitment to the individual it recognizes the manner in which states affect those very interests of the individual. The state is the institutional agent that protects and assists the individual in pursuit of his or her interests by providing an environment in which interests can actually be pursued. It is not that the state has interests unrelated to its citizens and residents, but that the state has interests in maintaining the social context which assists in helping the state to fulfill its function in relation to its citizens. This social context is like a commons in that it must be managed if it is to be effective over long periods. What is required in this social context will vary based upon our understanding of the interests of citizens, such as basic rights, and the kind of social context they choose to build for themselves and the role that government plays in providing that context. Societies can choose to provide different kinds of institutions for themselves based upon their own views that require different levels of

support. It is reasonable that when states make these commitments, that the effects of immigration policy upon these commitments be taken into account.

Relating government policy for immigration to government function has been recognized within migration policy, but not well explored.³⁷ Immigration affects the burdens placed upon institutions such as education or judicial systems. From this internal consideration it is reasonable for states to make policies that ensure these institutions function in a manner that meets the needs of both citizens and those who are admitted. For example, public education is typically provided in most countries today. When the ability of the educational system to function properly is threatened the state must take steps to preserve the system's proper function. If that threat results from a large number of immigrants who require additional language support, it might be reasonable for limits to be placed upon immigration until the proper function is secured. Consider the case of the Los Angeles Unified School District where nearly one-third of over 619,000 students are classified as English learners with at least 96 first languages spoken.³⁸ Resources are diverted to support teaching English to these students leaving fewer, and perhaps inadequate, resources for more general educational purposes. The state might be justified in this case to limit immigration. Migration policies that encourage a brain drain effect by inducing highly skilled people to emigrate require close consideration from this perspective. The migration of physicians might leave a state unable to coordinate adequate health care for its populace. When national policies encourage this kind of movement of physicians it should be considered troubling. Therefore, the state must also

³⁷ See Christina Boswell, "Theorizing Migration Policy: Is There a Third Way?," *International Migration Review*, 41 (2007): 75-100. Boswell develops a model of migration that focuses upon four state functions: security, wealth accumulation, fair treatment of all, and institutional legitimacy.

³⁸ Los Angeles Unified School District, Language Acquisition Branch, "Revision of the LAUSD Master Plan," staff presentation to the Board, Jan 31, 2011.

look externally, giving regard to the interests of other states. If the state's interest is in maintaining an environment which provides an environment that is good for its residents, other states must recognize the manner in which state policies affect this.

This aspect of the consensus reflects the commitments of moral particularism and moral universalism which Cole argued are incompatible. It aims to give consideration to both citizen and noncitizen, expressing the commitments of moral universalism. But it also recognizes that the context of states gives place to special obligations and distributes responsibilities differently to different individuals, reflecting the commitments of moral particularism. We do share commitments to those who are close to us. But these commitments do not negate the commitments we have to all. Both pieces are required for us to understand how we assess moral circumstances and why we act in moral circumstances. When moral universalism and particularism are joined together we can assess circumstances as morally troubling regardless of who is in the circumstance. We can also understand who, within the contextual framework, has both the responsibility and reasons to act. In some circumstances we recognize that a particular group of people have the responsibility to act. We don't all rush to fight the fire in the burning house down the street. Others have this responsibility. We recognize that for many issues of justice it is the state or one's compatriots who have responsibility and reasons to act. But this does not negate that when those who are responsible are unable or unwilling, that some responsibility falls to someone who is not normally responsible. The degree of responsibility or the extent of our actions is, in these cases, more limited than in others. If a lost and hungry child appears on my doorstep, I take the child in and provide food and warmth but I don't usually make the child a member of my family. Only when we

blend moral particularism and moral universalism together can we make the kinds of distinctions between who should act first and who should act later.

This blending is relevant when applied to problems of global justice as well. Miller in arguing against the cosmopolitan view writes: “This anti-cosmopolitan stance does not mean that we have no global duties at all. But it means that our duties have to be differentiated: we owe more to some than to others.”³⁹ But this distinction is compatible with Pogge’s claim that we treat positive duties differently than negative duties. If our duty is positive, in the sense that we provide for others, then distinctions in what support we are required to provide can be made. But if our duty is negative, then no distinctions are made. Pogge writes: “Miller is right that a person may, by living together in a political community, increase what they owe to one another, well above what they own to human beings in general...Persons cannot, by living together in a political community, decrease what they owe foreigners.”⁴⁰ Moral particularism doesn’t eliminate the obligation to those more distant; it merely makes it less pressing in those cases where we have equal obligations and a scarcity of resources. But it is worth noting here that in the case of equal obligation and a scarcity of resources, moral universalism doesn’t provide any guidance, leaving us in the situation of Buridan’s Ass. If two people are in equal need and we have equal obligation to each but with inadequate resources for both, we have no ability to decide who to help so we help no one, help each inadequately or help arbitrarily. If moral universalism leads to this kind of circumstance it is as troubling as moral particularism is to claim that our only obligations are to those with who we are

³⁹ David Miller, “Cosmopolitanism: A Critique,” *Critical Review of International Social and Political Philosophy*, 5 (2010): 83.

⁴⁰ Thomas Pogge, “Cosmopolitanism: A Defense,” *Critical Review of International Social and Political Philosophy*, 5 (2010): 91.

in relationship. The two commitments can, and must, coexist, working together. The moral consensus aims to bring this forward in a manner the open borders debates hasn't accomplished.

The goal here, and the difficult part to achieve in practice, is the balancing of interests that inevitably are part of any political context. The balancing is complex, between individual and states and citizens and noncitizens. The state cannot simply disregard the interests of some, nor can it give excess regard to some. In many circumstances the interests of one group will run counter to the interests of another. How these interests are balanced is problematic and doesn't promise an easy answer. But it is not appropriate to give consideration only to compatriots and the state's own interest.

Determining Negative Effects

What we care about most in the open borders debate, and hence in the consensus, is the negative effects of immigration policies. Therefore, the consensus addresses the effects of policies rather than simply stating that borders should be open or closed. Determining negative effects is not straightforward. Three issues arise: identifying the negative effects, measuring the negative effects and eliminating the negative effects.

The problem of identifying the negative effects of immigration policies is complicated by the presence of harmful conditions already existent in the world. People live in horrendous conditions around the world. But these conditions are not caused by immigration policies; they are caused by other problems such as corrupt governments, poor management and unfavorable natural conditions. Certainly the case is that the denial of immigration leaves people in these horrendous conditions, but it not immediately clear that this should considered a negative effect of immigration policies.

Feinberg's account of harm is useful to understand this problem. Not all actions harm (in Feinberg's sense of a setback to interests), and there is a distinction between a harmed condition (one in which there is some problem but no setback to interests) and harmful conditions (ones in which the harm is likely to continue).⁴¹ Immigration policies do not always cause harm, and even when they cause a setback to interests, it is not obvious that this is harm. Some setbacks are permissible and while they set back a particular interest, they do not create ongoing conditions of harm. In this sense, refugee policies can be easily distinguished from immigration policies because to deny the refugee the opportunity to move leaves the refugee in a harmful condition, one in which harm is likely to continue. The intent of this discussion is to emphasize the need to engage in careful consideration of what effects are attributable to immigration policies and what effects are due to other causes.

We must also give consideration to how to measure the effects of policies upon people both those within the state and those outside the particular state. This is an empirical question that will, as Bader has claimed, rely upon social and behavioral scientists to determine the valid measures. In some cases this might be the utilization of some aggregate measure, in other cases it needs to be the consideration of each individual. It is readily acknowledged by most that the well-being of a substantial number of people in the world is inadequate and is given inappropriate consideration by those whose well-being is more than adequate. These people, whose well-being is more than adequate, are obligated by liberal ideals, to consider the plight of others in the world. When that circumstance is affected by the policies of the state, the state has that same obligation. It might seem odd that an institution is obligated to give consideration to

⁴¹ Feinberg, *Harm to Others*, 31-32.

individuals far away. But we owe negative duties to everyone. Pogge argues that “compatriotism makes no difference to our most important negative duties.”⁴² If this claim is correct, then we must consider whether the effects of national immigration control policies violate a negative duty. The consensus position claims that this is determined by knowing the effects of the action. If the action harms, then we have a duty to refrain from that harm. If the action does not harm, then the state has more discretion in carrying out the policy. But to the extent that state actions affect people, both within and outside the state, the state must give consideration to those effects.

Finally, consideration must be given how best to eliminate the negative effects of immigration policies. The approach doesn’t necessarily require the opening of borders but rather the elimination of effects. Policies have many components and the interplay between these various components needs to be examined as well for the negative effects they create. It also leaves open the manner in which the negative effects of the policy might be mitigated. Wilcox argued that we have not just a negative duty to stop harming, but a positive duty to admit whenever that is the only available remedy for the negative effects resulting from our actions. Although this position is compatible with the consensus statement, it is not included because the numbers affected far exceed what can be admitted. For this reason it is more likely that the requirement to consider the negative effects of immigration policies will result in more extensive aid obligations or other kinds of actions. Consider again the problem of the brain drain effect, especially as experienced in sub-Saharan Africa. Medical personnel in this area frequently relocate to parts of Western Europe and the United States to fill needs for medical personnel in these countries. One possible resolution to this problem might be to cease recruitment of such

⁴² Pogge, “Cosmopolitanism: A Defense,” 87.

personnel, leaving the decision to relocate to be prompted solely by the choice of the individual. Another proposal might be to recognize that when a physician or nurse is admitted to permanent residency that the receiving state has an obligation to ensure that additional medical personnel are trained in the sending country.⁴³ This might strike some as odd since it implies training foreign personnel in foreign schools. But if one recognizes that the receiving country could have trained its own personnel instead of using immigrants, the net cost to the receiving country is not significantly different. Such an approach would permit movement but hopefully negate the deleterious effects of emigrants leaving their home countries without the implementation of the migration fee scheme proposed by Straubhaar. In the case where movement has both positive and negative effects, the states involved must in some manner compensate for the deleterious effects in exchange for the beneficial effects of the movement.⁴⁴

While the focus in this section has been upon immigration control policies that directly affect the control of the border, the effects of policies downstream must also be taken into account and some action taken to minimize those effects which are negative. For example, to grant entry without a plan of integration might have as negative an impact on the individual as the denial of entry that leads a person to remain in a situation of endangerment. The arrival of an immigrant in a foreign country, unable to navigate social systems, leaves that person subject to exploitation. The proponents on all sides of the argument agree that to admit immigrants and not provide a path for integration to an

⁴³ A similar idea has been proposed by Gillian Brock, "Emigration, Losses and Burden-Sharing: Which Arrangements are Fair?", paper presented at the annual meeting of the American Philosophical Association, Pacific Region, Seattle, Washington, April 4-7, 2012.

⁴⁴ A more difficult case would be where it is the sending country that receives the benefit and the receiving country suffers the costs. Such cases as the transfer of prisoners to their home country are such an example. It seems in such cases that the two states must negotiate to balance the costs and benefits in a manner satisfactory to both.

equal standing with existing citizens is unjust on the liberal account. In addition to interaction with policies downstream, consideration must be given to the interaction of immigration control policies with other policies related to problems of population density. How might immigration control policies affect policies regarding overpopulation or environmental degradation? Do people moving around the world improve or aggravate these problems? What happens if the policies increase or decrease the volume of remittances sent home? How do the policies affect the spread of disease around the world? These are just some of the problems that must be considered in determining what the negative effects of open or closed borders might be. The problem of negative effects is complicated and promises no easy solution.

Conclusion

In this chapter I have developed a consensus position regarding border controls based upon the central moral concerns of the open borders debate. This approach is modeled on the work of Wolff and de-Shalit related to the limited ability of egalitarian thought to influence public policy because there are many disparate accounts of equality available. Wolff and de-Shalit proposed the development of a consensus position as a means to overcoming theoretical debates that are fractured or polarized in a manner that prevents them from influencing public policy. The development of the consensus is the first step of a three-step process and captures the essential concerns of the debate. I explored some of the issues related to developing this consensus and distinguished it from the idea of an overlapping consensus associated with John Rawls.

I argued that the various arguments in the open borders debate are concerned with the effects of immigration control policies upon the ability of individuals to lead

meaningful lives. Developing this central concern into a consensus statement, I proposed that states have the right to control borders constrained by the obligation to give appropriate regard to the interests of citizens, noncitizens and states negatively affected by their policies. I then explored four different aspects of the consensus. First, I discussed that the state plays a prominent role in the consensus statement as the actor who possesses the authority to address the problems of immigration. I then discussed the idea of constrained rights utilizing Miller's distinction between basic and bare freedoms and Nozick's idea of side constraints. Thirdly, I explored the problem of interests, especially the idea that people have different kinds of interests that must be regarded as well as the interests of states in providing the context for the fulfillment of individual interests. This consideration of interest extends to both citizens and noncitizens. Finally, I explored the problem of negative effects, how to identify them and the need to distinguish them from the negative effects of other policies, the problem of measuring the effects and the problem of how to mitigate the negative effects.

The proposed consensus is not adequate to enable the specification of immigration policy. It has simply pointed us in the direction of what is important in the debate that policy needs to address. Just as it was necessary for Wolff and de-Shalit to develop a theoretical understanding of disadvantage as well as an understanding of how it was experienced by people prior to developing policy to address the condition of disadvantage, something similar needs to occur for the open border debate. We need to have an understanding of state interests that are tied to legitimate state functionings and how to maintain them. There must be a more complete accounting of legitimate individual interests. We must also understand the nature of the effects of immigration

policies so that it can be understood when those effects are negative in a manner that requires response. It is obvious that the denial of movement affects a person, but that alone should not be understood, in most cases, as a negative effect to be eliminated. If this were to be the case, then the only resolution is completely open borders. These questions are significant and remain open for further investigation. Undoubtedly, as this consensus statement is explored in the second and third steps of the process, the need to revisit and revise this position will occur.

CHAPTER 6

CONCLUSION

Our world struggles with the problems of immigration today. In the words of Bhagwati it is “out of control.”¹ Movement is permitted in some cases and denied in others, often for the most arcane of reasons. Even when not obscure, the reasons behind such decisions lack moral clarity or justification. That is the practical side of the problem. The theoretical side of the debate is just as complicated. If the basic commitment of liberal political theory is the equal moral standing of all individuals, how do we justify the presence of borders and their control such that individuals receive different consideration and treatment based solely upon their status as members of a particular political community? Over the past 30 years scholars have debated the problem of borders and border controls from the perspective of liberal political theory. The creation of “insiders” and “outsiders” and the resulting inclusion and exclusion is troubling to some and represents a state of “liberal incoherence” that cannot be defended. Yet, it is vigorously defended by those who hold to this same basic liberal commitment. This ongoing debate has not resulted in any resolution to the question or influenced in a substantive manner national policies related to immigration control. This thesis has attempted to bring a new focus to this debate by identifying the moral consensus found in

¹ Jagdish Bhagwati, “Borders Beyond Control,” *Foreign Affairs* 82 (2003): 99.

the debate which can be developed in a manner useful for influencing national immigration policies.

I only want to briefly here rehearse the argument that precedes this Chapter. After introducing the problem of borders from the perspective of liberalism I considered some of the most prominent arguments that have been offered in support of open and closed borders. The claims for open borders rely upon different starting points but all end with the conclusion that liberalism cannot support closed borders. This is the case because important principles for liberals, be they property rights, justice as fairness, utilitarianism, freedom of movement, freedom of association or common ownership of natural resources, when considered in light of the egalitarian, individualistic and rights based perspective of liberal thought, cannot be compromised without engaging in illiberal practices that deny people their rights. I have argued that these arguments are flawed and do not lead to the conclusions their proponents claim. Either alternative interpretations of central claims in their arguments exist that can be used to support closed borders to some degree, such as Carens' interpretation of Nozick or Steiner's use of Locke's view of world ownership, or the proponent has not adequately considered the claim that is being made and the unconsidered aspects of that claim, such as the principle of the freedom of movement, indicate the starting point is much more constrained than initially thought.

The claim that states may close their borders shares the same central commitments of liberalism as the open borders school, yet reaches a different conclusion. The arguments are somewhat more diverse than those for open borders. Walzer's membership argument relies upon a theory of goods that requires that political communities must be closed to some degree for social goods to have meaning and

function within society. It is a necessity of both human nature and human society for closure that requires membership be controlled. Miller's argument from national identity relies upon the positive contribution which national identity makes to people's lives to derive a right of political self-determination that includes moral commitments to compatriots that are more stringent than those to noncompatriots. Wellman starts with a single principle, the freedom of association and argues that countries may exclude those with whom they do not want to associate. As with the open borders arguments I argued that these arguments are flawed in ways that make them weaker than their proponents claim. Walzer's view of membership makes membership a dominant good, violating the conception of justice he develops. Miller's view is troubling to the extent that his reliance upon moral particularism leads us to make moral decisions that compromise the commitments we have to all people. Wellman conflates the idea of association as constitutive of self-determination and the idea that it is just an aspect of it. Wellman further confuses the manner in which association has value in personal lives as opposed to political relations, where the lack of association undermines people's well being. The result is that borders must be more open than is claimed.

I also considered a set of nonideal arguments that make the claim that in the absence of theoretical agreement, the need to resolve the great suffering in the world that many experience requires that we open our borders to those in need. Some claim that immigration is more effective than aid. I examined this argument from the perspective of Whelan and rejected the argument as being inadequate because there is evidence that aid is effective and the number of those who might use migration over aid is so large that migration cannot meet the need. I also rejected Wilcox's argument for a Global Principle

of Harm. Her theory is problematic in its details and cannot, in any manner, provide relief to a substantial number of people needing assistance in the world today nor provide any long-term guidance in the development of immigration policies. I also examined two proposals for international regimes for the control of movement between states. I rejected both proposals as either unworkable in their present state because of problems of complexity and enforcement or inadequate because of their overwhelming reliance upon troubling economic measures.

Finally, I proposed that our consideration of this issue will benefit from the identification of a moral consensus that captures about the central concern of the debate and that can be explored in a manner that will influence policy. In this approach I utilized the three-step model used by Wolff and de-Shalit related to the debates regarding egalitarianism which first identifies the consensus, then explores the consensus both theoretically and how it is experienced by people and finally develops policy recommendations to resolve the problems identified. This thesis focuses on the first step of the process, as it is essential to the overall project of resolving immigration issues.

I proposed the following consensus:

The right of states to control their borders is constrained by the moral obligation of a state to give appropriate regard to the interests of both itself and other states and of individuals (both inside and outside state borders, without regard for citizenship) affected by their immigration control policies and to minimize or eliminate the negative effects of those policies.

The central concern of the theorists in this debate is the effects of immigration control policies upon individual lives. This consensus captures this concern. It claims that state control of borders is constrained by the obligation to consider and eliminate the negative effects of those controls upon the interests of the local state and other states as well as people both inside and outside the border. By including the interests of other states and individuals outside the border, the consensus expresses the concerns of both sides of the debate and balances the role of moral particularism and moral universalism.

This consensus statement is by no means a final word as it represents only the first step of the process modeled by Wolff and de-Shalit. Understanding what are legitimate interests of individuals and states needs exploration. How can these interests be balanced against one another? How do we measure the effects of state actions? How are these effects actually experienced in the world? How do we distinguish those effects that are due directly to migration policies from those that are caused by other policies and institutions? This consensus doesn't tell us, nor do I think it will ever tell us, what migration policies ought to be between particular countries. There is also no simple yes or no answer to questions regarding the control of borders. Yet this consensus is a crucial element; it aims to establish a view of migration that reflects the liberal commitment to the equal moral worth of all people which applies to a truly global view of migration. It is also important to note that as a view based upon the commitments of liberalism it can be rejected by those who do not share those commitments. People and states which do not share the perspective of liberalism will need some other argument to agree to any scheme of cooperation regarding migration. One potential argument will be that to bring

order to disorder is in everybody's interests and will benefit those people and states that are hesitant.

The discussion regarding the status of borders is today vigorous and dynamic, yet it continues to move along the same dividing line that was initially established. I have attempted in this thesis to overcome that divide. If that can be accomplished, it will be possible to move the consideration of borders forward such that immigration policy can be modified to reflect a more just world, which is the proper goal of our concerns regarding global justice.

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